

No. COA07-654

NORTH CAROLINA COURT OF APPEALS

KAI-LING FU,)	
)	
Employee,)	
Plaintiff,)	
)	
v.)	
)	<u>From the North Carolina</u>
UNC CHAPEL HILL,)	<u>Industrial Commission</u>
)	
Employer,)	
)	
SELF-INSURED (KEY RISK)	
MANAGEMENT SERVICES, Third-)	
Party Administrator),)	
)	
Defendant.)	

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STATEMENT OF FACTS

Plaintiff, Dr. Kailing Fu, is a native of China with a DDS degree obtained from the West China University of Medical Sciences. (App. p. 96) Dr. Fu's job before leaving China was the second highest position in the dental hospital in which she practiced. (T p. 5) While treating dental patients with HIV infection, Dr. Fu conducted laboratory research on the pathology of HIV infection. Her work came to the attention of American physicians visiting China, and she was invited to come to the United States and continue her research at the University of North Carolina at Chapel Hill (UNC). (T p. 47) Dr. Fu was a very hard worker who wrote many research papers and had conducted a clinical trial by herself. (T p. 15)

At the time of the events giving rise to this claim, Dr. Fu was employed with UNC as a Research Analyst I in the Department of Microbiology and Immunology. (App. p. 91) Dr. Fu's work in the United States was focused on the development of a vaccine to protect against HIV. (T p. 7) To investigate HIV, a different virus, the Venezuelan Equine Encephalitis (VEE) virus is used in research. (T p. 11) As a condition of her employment, Dr. Fu was required to be vaccinated against the VEE virus in order that she might enter the laboratory in which the live VEE virus

was maintained. (T p. 12) The purpose of the vaccination is to produce a sufficient level of VEE antibody to indicate immunity against the VEE virus. (Boudreau p. 36)

Although the VEE virus is different from HIV, it is far from harmless. The virus, although often causing mild flu-like symptoms, has been known to cause serious illness and death in humans. (App. pp. 147-50; Boudreau p. 34) In the past, the Soviet Union was believed to have reproduced and stabilized the virus for weaponization. (Boudreau p. 40) The United States military is in the process of testing the VEE virus vaccine on humans. This vaccine is still in the experimental stages and is approved for use on human beings for research purposes only. (Boudreau pp. 27, 30). Currently, the vaccine is in Phase II testing for safety and immunogenicity, which measures the development of antibodies in response to the vaccine. (Boudreau p. 29)

On September 16, 2003, Dr. Fu received the first of two vaccinations with the VEE virus at the United States Army Medical Research Institute of Infectious Disease (USAMRIID) in Fort Detrick, Maryland. (T p. 13) This first vaccine contained live VEE virus. Prior to this vaccination, Dr. Fu had no history of infections or viral illness and she was in good health. (Boudreau p. 41)

Once a UNC laboratory worker receives an initial vaccination containing live VEE virus, the worker's blood is evaluated for the presence of antibodies to the virus. If the antibody level is sufficiently high, no booster shot is needed. If the person's antibody level is too low, a second inoculation, or booster shot, is required in order to boost the titer of VEE antibody and permit the person to satisfy the requirements of her employment. (T p. 16) The vaccine used in the booster shots is supposed to be killed by formalin, although at least one study has revealed that humans may still become infected with the VEE virus contained in the booster shot material. (App. p. 150)

For six days following the first vaccination, Dr. Fu experienced side effects of fever, headache, nausea, muscle aches, and weakness. (T p. 15; App. p. 138) Approximately two-thirds of patients exposed to the live virus experience similar side effects for a similar duration. (Boudreau p. 18)

Testing following the first immunization showed that the vaccine had failed to cause Dr. Fu to develop protective antibodies to the VEE virus. (Boudreau pp. 13-17) Thus, Dr. Fu was required to undergo a second inoculation before she would be permitted to work with live VEE virus. (Boudreau p. 14) On March 9, 2004, Dr. Fu traveled a second time to Fort Detrick

where she was inoculated with what was presumed to be a killed version of the VEE virus. (T p. 16; Boudreau p. 13)

The day following the second inoculation, Dr. Fu immediately began to experience side effects similar to those she had experienced following the first inoculation, but instead of resolving, the symptoms continued. (T pp. 16-17) Dr. Fu kept a detailed daily chart of her medical symptoms. On day 1 and day 37, Dr. Fu experienced faintness and problems with her balance and walking. In the first week, she charted fever, headache, rapid pulse, heart palpitations, and muscle ache. On days 6 through 21, she charted cough and sore throat. On days 12 through 20, Dr. Fu charted a runny nose. From days 3 to 26, she experienced chills. From days 5 through 20 and 33 through 63, Dr. Fu had diarrhea. From day 3 through day 90, Dr. Fu experienced shortness of breath and weakness. (App. pp. 138-45)

The purpose of giving Dr. Fu the killed virus was to initiate an immune reaction from her lymphocytes so that she would develop antibodies to the VEE virus. (Boudreau p. 36) Approximately 15-17% of patients who receive the killed vaccine experience side effects similar to those experienced by Dr. Fu, but usually the side effects are not as pronounced or prolonged. (Boudreau pp. 39, 41)

After the onset of side effects following the second inoculation, Dr. Fu initially treated at UNC Hospital where she was diagnosed with a viral upper respiratory tract infection. (App. pp. 11-12) After her symptoms persisted for a period of time, Dr. Fu contacted Dr. Ellen Boudreau, the director of the vaccine program at USAMRIID, and she was referred to the care of Dr. Robert Gwyther, a board-certified specialist in family medicine at UNC Hospitals. Dr. Gwyther prescribed a bronchodilator for Dr. Fu's shortness of breath and prescribed an inhaled steroid to treat her other symptoms. (Gwyther p. 10)¹

Dr. Fu's treatment with Dr. Gwyther provided no relief; therefore, Dr. Gwyther referred Dr. Fu to the care of Drs. Wunian Chen and Remy Coeytaux, who practice in the Department of Family Medicine at UNC, and who specialize in acupuncture and eastern medicine. (Gwyther p. 12) Dr. Coeytaux is a faculty member of the UNC School of Medicine who is board certified in the specialty of family medicine, and has a Ph.D. in epidemiology. (Coeytaux pp. 4-7) Dr. Coeytaux currently has a career development award from the National Institutes of Health to conduct research on acupuncture. (Coeytaux pp. 11-13) In

¹ As of the date of the filing of this brief, the deposition of Dr. Gwyther is not included in the record on appeal. The parties agree that Dr. Gwyther's deposition was inadvertently omitted, and on September 11, 2007, plaintiff submitted a Motion to Amend the Record on Appeal which is currently before the Court. Dr. Gwyther's deposition was presented to the Court along with that motion.

this research, he works very closely with Dr. Chen, a Chinese physician trained in both Chinese and western medicine. (Chen pp. 5-7) Dr. Chen is licensed to practice acupuncture in North Carolina and New York. (Chen p. 33) Dr. Fu received care from Drs. Chen and Coeytaux through September 20, 2004. (App. pp. 36-74)

In the weeks and months ensuing after the second inoculation, Dr. Fu attempted to work, both full time and part time. (T p. 23-24; App. pp. 139-145; Coeytaux pp. 20-22) Her attempts to return to her job were unsuccessful due to her virus-like symptoms, and an accompanying severe fatigue. As Dr. Fu explained, she would work for a few hours, and then return home, where she was unable to perform daily household activities such as cooking or washing dishes. At these times, she was unable to do anything but stay in bed. (T p. 24) Eventually Dr. Coeytaux recommended that Dr. Fu cease working entirely for a short period because he observed that Dr. Fu was "fatigued and fairly disabled." (Coeytaux p. 21) Dr. Fu reported temporary relief during the course of her treatment with acupuncture, but her symptoms did not gradually resolve; rather, they waxed and waned over a period of time. (Coeytaux p. 24) According to Dr. Gwyther, Dr. Fu had experienced "a dramatic change [from] her good health" following her inoculations. (Gwyther p. 14)

On June 16, 2004 Dr. Fu was examined at the request of her employer by Dr. Brian Boehlecke, the medical director of the University Employee Occupational Health Service. (Boehlecke p. 6) Dr. Boehlecke noted hyperventilation and anxiety as a part of plaintiff's psychological reaction to her fear that the vaccine caused her bodily harm. (Boehlecke p. 16) Dr. Boehlecke mistakenly believed that the types of symptoms that Dr. Fu had experienced following the second inoculation had not been observed in others to whom the killed vaccine had been administered. (Boehlecke p. 21)

All of the physicians who testified in this case agreed that Dr. Fu's symptoms were a typical response to the VEE vaccination, but the symptoms were more pronounced and more prolonged than had been seen in others who received the inoculation. (Gwyther pp. 15-17, 19; Coeytaux p. 23; Boehlecke p. 18; Boudreau p. 42) All of these doctors expressed the opinion that Dr. Fu either probably or possibly experienced an anxiety reaction to the symptoms from the inoculation. According to Dr. Gwyther, Dr. Fu had an immune system reaction to the vaccine, and "also . . . she has some psychological reaction to this. I think she is anxious about it." (Gwyther p. 15) Dr. Boehlecke's "feeling is that she was having a

psychological reaction, because she was very concerned that the vaccine might have caused her some harm." (Beohlecke p. 16)

According to Dr. Coeytaux, "anxiety played a part in this, and probably a significant part." (Coeytaux p. 32) As Dr. Coeytaux testified, "clearly when we first saw her she was very anxious. That anxiety then combined with the symptoms that are there can help explain why they were so prolonged, because they just - they just interacted with each other in a pathological, if you will, way - in a way that ended up making her health worse." (Coeytaux p. 34) Even Dr. Boudreau, who concludes that it is "unlikely" that Dr. Fu's prolonged symptoms were related to the vaccine, testified as follows: "Well, I believe that she initially had some symptoms and perhaps she had another illness that followed it, or perhaps she was, had a level of anxiety concerning the vaccine." (Boudreau p. 43)

After a long period of rest and treatment with acupuncture, Dr. Fu's symptoms eventually resolved and she returned to her normal state of health. (T pp. 34-35) By the first week of December 2004, she was ready to return to work; however, at that time Dr. Fu's job was no longer available to her, since her supervisor, Dr. Nancy Davis, told Dr. Fu that she could no longer work in the lab in the presence of the VEE virus. (T pp. 35-36) Since the only work performed in Dr. Fu's lab involved

the VEE virus, Dr. Fu was required to seek alternative employment. (T p. 37)

According to her treating physicians, Dr. Fu's employment with UNC caused or significantly contributed to the symptoms for which Dr. Fu was treated over the course of months following her second inoculation. (App. p. 81; Gwyther p. 15; Coeytaux p. 29-32)

In the opinion of Dr. Ellen Boudreau of USAMRIID, persons such as Dr. Fu, who because of their employment participate in the government's experimental program studying the effects of the VEE vaccine, are at increased risk over persons in the general population for having the systemic side effects resulting from the vaccine that were experienced by Dr. Fu. (Boudreau pp. 40-41)

Dr. Fu's treating physicians testified to their opinions that the periods of time in which Dr. Fu worked part-time or did not work while she was being treated for symptoms following inoculation with the VEE virus were reasonable and directly related to the inoculation. (App. pp. 80-82; Gwyther p. 15; Coeytaux pp. 29-32)

Dr. Fu's average weekly wage on the date of her injury was \$935.17, leading to a workers' compensation rate of \$623.48. (App. p. 1) Following the loss of her job, Dr. Fu searched

diligently for alternative employment. On April 1, 2005, she accepted a position as a Research Technician III in the Lineberger Comprehensive Cancer Center. (App. p. 91)

ARGUMENT

In urging reversal of the Full Commission's Opinion and Award, defendant UNC does not suggest that the Commission made any error regarding the law, but rather purports to contend that the appeal is based on a lack of any competent evidence to support the Commission's findings which renders its conclusions of law erroneous. Defendant is actually disregarding the standard of review governing appeals from decisions of the Industrial Commission and basing its appeal solely on the assertion that the Commission should have believed its evidence, should have given that evidence more weight, and should have found Dr. Fu's testimony and the testimony of her three treating physicians not credible.

As the Supreme Court has repeatedly held, however, the Commission's determination of the weight and credibility of the evidence is not subject to review on appeal. *See, e.g., Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) ("[T]he full Commission is the sole judge of the weight and credibility of the evidence."); *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) ("It is the Commission that

ultimately determines credibility," and an appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." (internal quotations omitted)). "Appellate courts reviewing Commission decisions are 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." *Deese*, 352 N.C. at 116, 530 S.E.2d at 552.

Contrary to what defendant is asking, the appellate courts cannot reweigh the evidence before the Commission and make new and opposing determinations of credibility. Because ample evidence exists to support the contested findings of the Full Commission, and the findings support the Commission's conclusions of law, this Court should affirm the decision below.

I. THERE IS COMPETENT EVIDENCE IN THE RECORD SUPPORTING THE COMMISSION'S FINDINGS, WHICH IN TURN SUPPORT ITS CONCLUSION THAT DR. FU SUSTAINED A COMPENSABLE OCCUPATIONAL DISEASE UNDER THE NORTH CAROLINA WORKERS' COMPENSATION ACT, AND DEFENDANT IMPERMISSIBLY CHALLENGES THE WEIGHT, CREDIBILITY, AND COMPETENCY OF DR. FU'S EVIDENCE ON APPEAL.

Section 97-53 of the Workers' Compensation Act (hereinafter, "the Act") sets forth specific medical conditions that are automatically deemed occupational diseases without further proof. N.C. Gen. Stat. § 97-53. An employee who contracts an illness or disease not specifically named in the

statute may establish that her condition is occupational pursuant to section 97-53(13). *Id.* § 97-53(13). That provision defines "any other" occupational disease as "any 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 employment." *Id.*

The North Carolina Supreme Court enumerated the necessary elements of an occupational disease claim under section 97-53(13) in *Rutledge v. Tultex Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983). To establish a compensable occupational disease, the employee must show that her disease or condition meets the following three criteria: (1) the condition is "characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged"; (2) the condition is "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 is "a causal connection between the disease and the [plaintiff's] employment." *Id.* at 93, 301 S.E.2d at 365 (quotations omitted). "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, 101, 301 S.E.2d at 365-69. The third element is satisfied if the occupational exposure "significantly contributed to, or was a significant causal factor in, the disease's development." *Id.* at 101, 301 S.E.2d at 369-70.

The Full Commission's Conclusion of Law 4, that "[p]laintiff suffered a compensable occupational disease on or about March 9, 2004 as a result of the work she performed for defendant" (R p. 35), was proper because competent evidence in the record establishes Dr. Fu has met all of the *Rutledge* factors.

A. SUFFICIENT EVIDENCE EXISTS TO SUPPORT THE COMMISSION'S FINDING THAT DR. FU'S EMPLOYMENT AS A RESEARCH ANALYST WORKING WITH THE VEE VIRUS EXPOSED HER TO A GREATER RISK OF DEVELOPING HER CONDITION.

The Full Commission found that Dr. Fu "was placed at an increased risk over persons in the general populations for these symptoms by virtue of her employment through participation in the government's experimental program studying the effects of the VEE virus." (R p. 33) The Commission's finding that Plaintiff was at a greater risk of developing her symptoms than members of the general public not similarly employed was supported by competent evidence.

The VEE virus is known to be lethal to laboratory animals and human beings. (Boudreau 26-27, 33-34; App. p. 148-50) As a condition of her continuing employment, Dr. Fu was required to be exposed to an experimental VEE vaccine on September 16, 2003 and March 9, 2004. (T pp. 13, 16) The VEE vaccine is still in the experimental stages of development and is not approved by the FDA for inoculation of the general public. (Boudreau p. 30) The live virus vaccine is known to cause certain side effects, including fever, headache, nausea, muscle aches, and weakness. (Boudreau 18, 40) A small percentage of patients exposed to the vaccine containing the dead virus suffer illness or contract the VEE virus if the live virus resists formalin inactivation. (App. p. 150) In fact, the FDA approves experimental inoculation by the military only for individuals who might come into contact with VEE through their work. (Boudreau 41)

Approximately two-thirds of patients exposed to the live virus vaccine experience side effects similar to those experienced by Dr. Fu for a similar duration. (Boudreau p. 18) Of those patients who receive the killed vaccine, approximately 15-17% experience side effects similar to Dr. Fu's, but usually the side effects are not as pronounced or prolonged. (Boudreau pp. 39, 41).

Dr. Boudreau testified that in her opinion, persons such as Dr. Fu, who because of their employment participate in the government's experimental program studying the effects of the VEE vaccine, are at increased risk over persons in the general population for having the systemic side effects resulting from the vaccine that were experienced by Dr. Fu. (Boudreau pp. 40-41)

Because of Dr. Fu's work as a research analyst in an immunology lab, she became one of a small number of individuals permitted and required to receive the VEE vaccine. Since Dr. Fu was required to be inoculated with an experimental vaccine which is not available to the general public, her occupation exposed her to a greater risk of contracting an immunologic illness or disease than members of the public generally who are not so inoculated. Thus the Commission's finding is supported by the evidence.

B. AMPLE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT DR. FU'S WORK-RELATED EXPOSURE TO THE VEE VIRUS CAUSED OR SIGNIFICANTLY CONTRIBUTED TO THE DEVELOPMENT OF HER CONDITION.

With regard to the third prong of the *Rutledge* test, the Full Commission found (1) that "[t]he greater weight of the medical evidence shows that the injections caused or significantly contributed to plaintiff's symptoms and resulting

immunologic response," and (2) that "[p]laintiff's employment with defendant-employer, particularly defendant-employer's requirement that plaintiff receive the VEE vaccination in order to enter the laboratory in which the live VEE virus was housed, caused or significantly contributed to the symptoms for which plaintiff was treated over the course of months following her second inoculation."² (R p. 33) The extensive evidence in the record establishing causation provides ample support for the Commission's findings.

Dr. Fu's treating physicians, Drs. Coeytaux, Gwyther, and Chen, all testified to their firm opinions that the March 9, 2004, injection caused or significantly contributed to plaintiff's symptoms. Dr. Coeytaux testified as follows: "I think it is more likely than not [the cause]. That was the most likely cause and a probable one." (Coeytaux pp. 29-30) Dr. Gwyther stated that in his opinion, "Dr. Fu's subjective complaints were real, and were the direct result of her having experienced progressively more severe reactions to the VEE virus inoculations." (App. p. 80; Gwyther pp. 14-17, 29) Dr. Chen

² Defendant does not include the latter Finding of Fact 28 in Defendant's Assignments of Error as required by Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure; therefore, defendant has waived any challenge to this finding.

also opined that there was a causal connection between Dr. Fu's symptoms and the second vaccination. (Chen pp. 24-25, 32-33)

Prior to Dr. Fu's exposure to the VEE virus vaccine, she had no history of infections or viral illness and she was in good health. (Boudreau p. 41) Immediately after the exposure to the live virus on September 16, 2003, Dr. Fu developed symptoms of fever, headache, nausea, muscle aches, and weakness that lasted approximately one week. (T p. 15; App. p. 138) After recovering and returning to work, Dr. Fu was again exposed to the VEE virus allegedly inactivated by formalin on March 9, 2004. (T pp. 16-17) Dr. Fu immediately experienced symptoms including faintness, problems with balance and walking, fever, headache, rapid pulse, heart palpitations, muscle ache, cough, sore throat, runny nose, chills, diarrhea, shortness of breath, weakness, anxiety, and hyperventilation. Appearing intermittently, these symptoms persisted for months before Dr. Fu recovered. (App. pp. 138-45)

The occupational disease developed by Dr. Fu after exposure to the virus was her immunologic response, which was a known risk of the vaccine, and the symptoms of which were well documented by Dr. Fu, who has a background in medicine.³ As Dr. Gwyther

³ Dr. Fu received a four year degree in medicine in China as an undergraduate. (T p. 4; App. p. 96)

explained, injection with a killed virus has the purpose of stimulating a response in the immune system that produces antibodies. (Gwyther pp. 23-24) Thus, in spite of Dr. Fu's objectively normal tests, Dr. Gwyther testified that "my best judgment is that she was having symptoms because of her immune system" responding to the vaccine. (Gwyther p. 23) Dr. Boudreau agreed that although Dr. Fu had a normal white cell count, this does not rule out an immunologic response to a vaccine. (Boudreau 38)

Although defendant contends that the Commission's findings of fact on the issue of causation are not supported by competent evidence, the text of defendant's argument actually quarrels with the competency and weight of Dr. Fu's evidence, particularly the medical evidence. Defendant asserts that "[t]he medical evidence of record does not establish that the Plaintiff's symptoms were in any way related to the [second] booster shot taken on [March 9, 2004]." (Br. p. 9) Defendant also contends that "Plaintiff was inconsistent that her complaints were related to the VEE booster shot." (Br. P. 10) However, defendant points only to the testimony of Drs. Boudreau and Boehlecke as support for its position. Defendant claims that "Dr. Boehlecke's opinion should have been accorded more weight by the Full Commission." (Br. Pp. 10-11) Contrary to

what defendant is asking, the appellate courts cannot reweigh the evidence before the Commission and make new and opposing determinations of weight and credibility.

The Commission's Opinion and Award includes the following findings regarding the credibility and weight of the evidence: (1) "plaintiff's testimony regarding her symptoms following the second inoculation is credible," and (2) "[t]he testimony of Drs. Gwyther, Coeytaux and Chen that plaintiff's symptoms were caused by the second inoculation are hereby given greater weight than the testimony of Drs. Boudreau and Boehlecke." (R p. 33) Defendant's attempt to challenge these findings is impermissible on appeal. N.C. Gen. Stat. § 97-86; *Deese*, 352 N.C. at 115, 530 S.E.2d at 552; *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

Defendant also complains that neither Dr. Chen's nor Dr. Coeytaux's testimony was competent because they did not testify to a reasonable degree of medical certainty.⁴ Our Supreme Court has held "that the entirety of causation evidence" must "meet the reasonable degree of medical certainty standard necessary to establish a causal link." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). "Although medical certainty is

⁴ Notably, in its brief, defendant does not even challenge the competency of Dr. Gwyther's opinion on causation. Dr Gwyther's testimony standing alone was sufficient to support a finding of causation. (App. p. 80; Gwyther pp. 14-17, 29)

not required, an expert's 'speculation' is insufficient to establish causation" in a workers' compensation claim. *Id.* Both Dr. Chen's and Dr. Coeytaux's testimony meets this standard.

Defendant takes the position that Dr. Coeytaux's opinion was insufficient because he "was not able to say with any certainty that the Plaintiff's symptoms were related to the VEE virus." (Br. P. 12) Defendant mischaracterizes the testimony of Dr. Coeytaux, who merely testified that he did not "like using that term 'certain.'" (Coeytaux p. 29) When asked if plaintiff's symptoms were "more likely than not" the result of her vaccine, Dr. Coeytaux testified, "I have always believed that, so, yes. I think it is more likely than not. I think it is probable that is the case." (Coeytaux p. 30) Dr. Coeytaux's testimony that Dr. Fu's symptoms were "more likely than not" the cause meets the standard of reasonable medical certainty. *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 496, 613 S.E.2d 243, 253 (2005) (holding that doctor's expert testimony of "could or might," together with his medical records stating it plaintiff's condition "more likely than not [was] related to his injury," exceeded "speculation" and was competent evidence that plaintiff's impotence and urination conditions were caused by the accident).

Defendant also claims that Dr. Chen admitted "that he could not say to a reasonable degree of medical certainty that the Plaintiff's symptoms were related to the VEE virus." (Br. P. 12) A review of the testimony defendant cites merely shows that when Dr. Chen was asked on cross-examination whether he could give his opinion "to a reasonable degree of medical certainty," he questioned whether his license to practice acupuncture allowed him to give a "medical answer" from a "Western medical diagnosis." (Chen pp. 32-33) Dr. Chen then explained that from an "Eastern acupuncture diagnosis," he was "sure" that Dr. Fu's symptoms were caused by the VEE virus. (Chen pp. 32-33) Dr. Chen's opinion as an acupuncturist was, therefore, competent evidence on causation.

The testimony of Drs. Chen, Coeytaux, and Gwyther is more than sufficient to satisfy Dr. Fu's burden of proving causation. Accordingly, there was competent evidence in the record to support the Commission's findings of fact and those findings, in turn, justify the Commission's conclusion that Dr. Fu suffered a compensable occupational disease.

II. THE COMMISSION PROPERLY FOUND THAT DR. FU'S OCCUPATIONAL DISEASE CAUSED OR SIGNIFICANTLY CONTRIBUTED TO THE EXTENDED DURATION OF HER DISABLING SYMPTOMS, WHICH WERE INTERTWINED WITH AN ANXIETY RESPONSE TO HER PHYSICAL SYMPTOMS, AND CONCLUDED SHE WAS ENTITLED TO BENEFITS FOR A FINITE PERIOD.

The Full Commission found that "[t]he greater weight of the evidence shows that plaintiff experienced stress and anxiety from the symptoms of the inoculation which contributed to the length and extent of her disability," and thus concluded that Dr. Fu was entitled to medical compensation and disability benefits during the period from March 11, 2004, until March 31, 2005. (R pp. 33, 35) The Opinion and Award should be affirmed.

It is well settled in this state that where total incapacity is caused by a psychological disorder brought on by a physical work-related injury, the entire resulting disability is compensable. *Hill v. Hanes Corporation*, 319 N.C. 167, 353 S.E.2d 392 (1987). In *Hill*, the Supreme Court upheld decisions of the Industrial Commission and Court of Appeals awarding total disability benefits on the basis of depression that totally incapacitated the plaintiff from work and was causally related to his physical injuries suffered on the job. *Id.* at 169, 353 S.E.2d at 394.

The testimony of the medical providers in this case points in the same direction: that Dr. Fu experienced very real and quite typical physical symptoms following her second

inoculation, and the combination of those symptoms and her anxiety reaction to those symptoms led to a period of prolonged recovery and caused her to be disabled from working for a distinct period of time. Dr. Coeytaux made it clear that Dr. Fu's anxiety was not about her work, but instead was "related to her health and her symptoms and her concern about what was happening to her, and her concern about not being able to do the things she wanted to do." (Coeytaux p. 40). When asked whether the anxiety was interdependent with the initial reaction to the vaccine, Dr. Coeytaux testified as follows: "Yes. I - I believe that it resulted from the symptoms that she experienced and then it became intertwined." (Coeytaux p. 45)

When asked whether Dr. Fu's psychological reaction was part of the chain of causation that began with the vaccine, Dr. Gwyther testified:

It is, but I believe it was in response - I mean, you can be anxious - if somebody stands up and points a gun at your head, it is going to cause you to be anxious. And the anxiety will then will cause some physical symptoms, perhaps, like you start sweating or whatever. This vaccine, I believe, set off a bunch of things in her that she - you know, that she lists at length on those sheets of paper over there. And I think her anxiety was in response to the symptoms, I can't tell you that it was in response to the shot specifically, but I think it was the result of the shot because of the other symptoms that it caused.

(Gwyther pp. 29-30)

In *Cooke v. P.H. Glatfelter /ECUSTA*, 130 N.C. App. 220, 502 S.E.2d 419 (1998), the plaintiff sustained a severe electric shock to her right forearm while operating a machine. She was diagnosed with compartment syndrome and underwent emergency surgery. *Id.* at 221, 502 S.E.2d at 420. Although subsequent testing revealed that the plaintiff was not suffering from nerve damage, and the "somewhat clawed position" in which she held her hand could not be explained physiologically, the Court of Appeals upheld an award for total disability, based on medical testimony that the plaintiff suffered from ongoing psychological disorders caused by her injury, and that these disorders in turn decreased her ability to use her right hand. *Id.* at 223, 502 S.E.2d at 422.

In this case, the testimony of Drs. Coeytaux and Gwyther is more than sufficient to satisfy the plaintiff's burden of proof that she was temporarily disabled from a combination of physical and psychological symptoms as a result of her work-related exposure to an occupational illness. See *Workman*, 170 N.C. App. at 496, 613 S.E.2d at 253 (holding that doctor's expert testimony of "a very strong linkage" between an injured worker's psychological condition to his accident was sufficient to take the case "out of the realm of conjecture and remote possibility.")

Contrary to defendant's assertion, Dr. Fu need not establish that her "employment exposed her to a greater risk of contracting anxiety than the public generally" to receive compensation for her ongoing symptoms and resulting period of disability.⁵ (Br. P. 15) Defendant's argument misstates the level of the plaintiff's burden required to show that a mental condition results from a work-related impairment. In none of the cases finding that emotional or mental conditions flowing from work-related injuries were compensable was the plaintiff required to show that the emotional or mental condition was an occupational disease in itself. See, e.g., *Davis v. Edgcomb Metals Company*, 63 N.C. App. 48, 303 S.E.2d 612 (1983)(holding that plaintiff's inability to work due to depression was compensable where the depression resulted from an inability to accept the permanent injury to his leg); *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 360 S.E.2d 109 (1987) (holding that depression resulting from work-related physical injury in itself constituted a change of condition); *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981) (holding that if employee receives a compensable injury which causes her to become so emotionally disturbed that she is unable

⁵ Defendant's reliance on *Sebastian v. Watkins Hair Styling*, 40 N.C. App. 30, 251 S.E.2d 872 (1979), is likewise misplaced. There is no evidence that Dr. Fu suffered from a particular susceptibility to her disabling symptoms.

to work, she is entitled to compensation for total incapacity). The Commission's decision is, therefore, supported by competent evidence and controlling legal principles.

CONCLUSION

For all of the foregoing reasons, the Opinion and Award of the North Carolina Industrial Commission should be affirmed.

Respectfully submitted, the 13th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF APPELLEE'S BRIEF upon the defendant by placing a copy of same in the U.S. mail, postage prepaid, addressed to defendants' attorney of record as follows:

Mr. Marc X. Sneed
Assistant Attorney General
NC Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

This the 13th day of September, 2007.

Leto Copeley

Jessica E. Leaven