NO. COA04-820

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2005

RUTH LEONARD,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 009309

KING SASH & DOOR, INC.,
Employer,
Defendant,

and

THE PMA INSURANCE GROUP,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 18 February 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 February 2005.

Garry Whitaker, P.C., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews and Angela M. Easley, for defendant-appellants.

LEVINSON, Judge.

Defendants (employer King Sash & Door, and insurance carrier PMA Insurance Group) appeal from an Opinion and Award of the Industrial Commission awarding plaintiff (Ruth Leonard) temporary total disability and medical benefits. We affirm.

Uncontradicted record evidence establishes, in relevant part, the following: Plaintiff Ruth Leonard was born in 1954; she attended school until the seventh grade, when she quit to get married. From 1988 until 2000 plaintiff worked for defendant King Sash as a factory worker, assisting with assembly and manufacture of doors and related items. In September, 2000, plaintiff filed a workers' compensation claim alleging that she had injured her knee at work on 19 January 2000, and seeking medical and disability benefits. Defendants denied the claim on the grounds that plaintiff's injury did not arise out of and in the course of her employment.

Plaintiff's claim was heard by a Deputy Commissioner of the North Carolina Industrial Commission on 28 January 2003. The evidence presented at the hearing is summarized, in relevant part, as follows: Plaintiff testified that in January, 2000, she missed two weeks of work because she had the flu. When she returned to work on 17 January 2000, she was still experiencing body aches, joint pain, and swelling, and complained to a coworker, Dorothy Brown, about her swollen and aching knees and joints. Two days later, on 19 January 2000, plaintiff was helping another coworker move a rolling cart, or "buggy," when the buggy became stuck in a flooring seam crack in the plant's floor. Plaintiff tried to dislodge it by pushing hard with her right foot and, as she did so, her knee "twisted" and "popped real loud." Plaintiff worked the rest of her shift that day, although her knee felt worse with the passage of time. The next day plaintiff went to the emergency room of Forsyth Memorial Hospital, where she was diagnosed with acute knee pain and referred to Dr. Edward Pollock, an orthopaedic surgeon. On 21 January 2000 plaintiff consulted her family doctor, Dr. Moyer, about her knee injury. Because Dr. Moyer agreed with the hospital's referral to Dr. Pollock, he did not treat plaintiff's knee. On 21 January 2000 plaintiff also reported to defendant's Safety Director, Bobby Faw, that she had injured her knee.

Dr. Pollock testified that when plaintiff began treatment with him on 1 February 2000, she told him that she had injured her knee at work. After conservative treatments failed to bring plaintiff relief from knee pain, Dr. Pollock performed two arthroscopic surgeries, revealing the presence of chondromalacia, or roughened cartilage, in plaintiff's knee. Dr. Pollock testified that in his opinion, within a reasonable degree of medical certainty, "her episode at work . . . caused the cartilage surfaces to become roughened and generated the cascade of events where she went to the emergency room and continued to have pain throughout the next several months." He testified further that he believed plaintiff's symptoms were caused by the traumatic injury at work, and not by the gradual deterioration typical of old age:

> DR. POLLOCK: . . . Ms. Leonard's findings of chondromalacia . . . were more the result of a _ some kind of peak load injury, I felt, because she had a little bit of wear and tear around the rest of her knee, but that was much more accentuated up in her patella-femoral joint. . . . . PLAINTIFF'S ATTORNEY: I think the question was put to you whether or not - whether it would be consistent with your medical findings of Ruth Leonard that she was suffering from a degenerative process as opposed to an acute traumatic process. DR. POLLOCK: . . . Because of the location of her chondromalacia - of the wear and tear in her knee and her paucity of complaints of knee problems to me before that and this history of the acute event at work, all that fits with an acute problem in her patella-femoral joint. . . . . DEFENDANTS' ATTORNEY: . . . It sounds like . . . you saw a very specific point of deterioration but not in other points; and, therefore **you were thinking it was not a degenerative condition overall**. DR. POLLOCK: **Correct**.

Despite the surgery, plaintiff continued to experience significant pain. Dr. Pollock recommended a third arthroscopic procedure, which plaintiff had not been able to afford as of the date of the hearing.

Dorothy Brown testified that she and plaintiff were co-workers at defendant King Sash & Door. However, they were not personal or social friends, and on 19 January 2000 Brown was not

assigned to the same work area as plaintiff. Brown corroborated plaintiff's testimony that they occasionally helped push a "buggy" full of doors. She also corroborated plaintiff's testimony that, when plaintiff returned to work on 17 January 2000, she complained of aching joints.

Testimony was also presented from two other physicians: Dr. R.L. Montgomery testified that in January, 2000, he worked in the emergency room at Forsyth Memorial Hospital. When plaintiff visited the hospital on 20 January 2000, Dr. Montgomery did not personally treat her; his role was limited to "signing off" on the report of another health care provider. This report indicated a diagnosis of "acute right knee pain with swelling" and a referral to an orthopaedic specialist. Dr. Frank Moyer testified that he had been plaintiff's family physician since 1999, and had never known her to present invalid or false medical complaints. He had reviewed her medical records as far back as 1991, and found no indication of prior problems in her knee. On 21 January 2000 plaintiff sought treatment for a "knee injury." He agreed with the hospital's referral to Dr. Pollock to be the "primary treating physician" for plaintiff's knee injury.

Following the hearing, the deputy commissioner on 27 June 2003 awarded plaintiff medical and disability workers' compensation benefits. Defendants appealed, and the matter was heard by the full Commission on 15 January 2004. On 18 February 2004 the Commission issued an Opinion and Award affirming the deputy Commissioner and awarding plaintiff temporary total disability compensation and medical benefits, and ordering that defendants "are entitled to receive a credit for the disability compensation that has been paid to plaintiff." From this Opinion and Award, defendants appeal.

Standard of Review

"Ordinarily, to establish a compensable claim under the Workers' Compensation Act, the plaintiff must demonstrate that he sustained an injury by accident arising out of and in the course

of his employment." *Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987) (citation omitted). "'Arising out of the employment' refers to the origin or cause of the accidental injury, while 'in the course of the employment' refers to the time, place, and circumstances of the accidental injury." *Roman v. Southland Transp. Co.*, 350 N.C. 549, 552, 515 S.E.2d 214, 216 (1999) (quoting *Bartlett v. Duke Univ.*, 284 N.C. 230, 233, 200 S.E.2d 193, 194-95 (1973)). As regards the cause of an injury, "plaintiff has the burden of proving causation by the preponderance of the evidence. Where the nature of the injury alleged involves complicated medical questions, only an expert can give competent evidence as to causation." *Alexander v. Wal-Mart Stores, Inc.*, __ N.C. App. __, __, 603 S.E.2d 552, 555 (2004) (citing *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (other citation omitted)).

The Commission's duties in a workers' compensation case have been summarized as follows:

> The Commission . . . is required to hear the evidence and file its award, 'together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue.' N.C.G.S. §97-84 (2003). While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award.

Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 705, 599 S.E.2d 508, 511-12 (2004) (citation omitted). In making its determinations, "'[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*,265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). Further, the Commission's findings "are

conclusive on appeal when supported by competent evidence" even though evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). "As a result, appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Southern Tire Sales*, 358 N.C. at 705, 599 S.E.2d at 512 (citation omitted). Moreover, findings of fact not challenged on appeal are binding on this Court. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Defendants argue first that the Commission erred by concluding that on 19 January 2000 plaintiff suffered a compensable right knee injury by accident arising out of and in the course of her employment. We disagree.

Preliminarily, we note that although defendants assigned error to certain of the Commission's findings of fact, they present no arguments in their brief that any of the Commission's findings are not supported by competent evidence. These assignments of error are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). Accordingly, the Commission's findings of fact are conclusively established on appeal, and our review is restricted to a determination of whether these findings support its conclusions of law. *Herbie's Place*, 157 N.C. App. at 180, 579 S.E.2d at 118 (where "defendants failed to assign error to any of the Commission's findings of fact . . . these findings are conclusively established on appeal"). (citation omitted).

In the instant case, the Commission's findings of fact included, in relevant part, the following:

> 1. At the time of the hearing before the Deputy Commissioner, plaintiff was forty-five (45) years old. Plaintiff was employed with defendant-employer . . . [and] occasionally assisted a co-worker in moving heavy solid core doors with the buggy.
>
> 2. On January 17, 2002, plaintiff returned to work from being out of work for more than a week due to the flu. . . .
>
> 3. On January 19, 2002, plaintiff was helping another worker push a heavy buggy stacked with solid core doors. The wheels of the buggy became locked in a crack in the floor of the shop. Plaintiff used her right foot to push the buggy in order to dislodge the buggy from the floor. As plaintiff pushed the buggy with her foot, she immediately felt an onset of pain in her right knee from twisting it and from the pressure she applied to her foot. As she twisted her knee, plaintiff heard a popping sound in her right knee. . . .
>
> 4. . . . Although plaintiff continued to experience knee pain throughout the remainder of her shift, she was successful in completing her assigned duties.
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> 5. . . . Plaintiff did not notify her supervisors on the day of the injury as to the accident.
>
> 6. Plaintiff's knee was swollen overnight and the following morning she sought medical attention at Forsyth Medical Center.
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> 7. Plaintiff was apprehensive about reporting the injury[.] . . .
>
> 8. Plaintiff feared she would be terminated if she had any additional absences[.] . . . Plaintiff suffered from severe acid reflux disease, chronic asthma, chronic bronchitis, high blood pressure, depression and irritable bowel syndrome.
>
> 9. On January 19, 2000, plaintiff presented to Forsyth Medical Center Emergency Department and . . . was diagnosed with acute right knee pain and bronchitis. Dr. Montgomery opined plaintiffs symptoms were consistent with traumatic injury to the knee . . . which was present a short time after the incident and was

not indicative of long-standing knee problem. Dr. Montgomery referred plaintiff to Orthopaedic Specialist of the Carolinas for treatment.

10. . . . [The hospital] medical records . . . failed to indicate a specific calendar date for the onset of symptoms.

11. On January 21, 2000, plaintiff informed defendant-employer's safety director, Bobby Faw, she had injured her knee at work. . . . Mr. Faw never received any information indicating plaintiff had any knee problems due to work prior to January 19,2000.

12. Plaintiff never indicated knee problems or knee injury to her family physicians . . . from October 1990 through January 21, 2000.

13. On January 21, 2000, plaintiff sought treatment from her family physician, Frank Moyer, M.D. . . . Plaintiff did indicate to Dr. Moyer's staff that she had injured her knee at work.

14. . . . Dr. Moyer was aware she had been referred to an orthopaedist and as result did not go into great detail as to a description of the injury at work. . . ..

15. Plaintiff presented to F. Edward Pollock, Jr., M.D., an orthopedist at Orthopaedic Specialists of the Carolinas, . . . [and] indicated to Dr. Pollock that she had injured her knee at work when she twisted her knee and had been in pain since the time of the injury. Dr. Pollock treated plaintiffs[‘] knee with injections, pain medications and a knee sleeve. Dr. Pollock's conservative treatment was unsuccessful and . . . arthroscopic surgery . . . . was performed on March 3, 2000 at which time Dr. Pollock smoothed the damaged and rough cartilage on the end of plaintiffs[‘] patella to reduce friction.

16. After March 1, 2000, [plaintiff]. . . continued to suffer from tenderness, pain, swelling and occasional popping. Dr. Pollock prescribed medication, physical therapy, and injections in order to try to deal with these symptoms.

17. On October 5, 2000, Dr. Pollock performed a second arthroscopic surgery on plaintiff's right knee. . . . Dr. Pollock opined plaintiff's condition was consistent with having suffered an injury at work . . . [and that] the location of the chondromalacia and the paucity of the complaints of knee

problems by plaintiff before the history of an acute event at work further supported the determination that she in fact had an acute problem in the patella femoral joint.

18. Dr. Moyer took plaintiff out of work from January 21, 2000 to her appointment on February 1, 2000. Pursuant to Dr. Pollock's direction, plaintiff was also out of work from February 1, 2000 through August 1, 2000.

19. On August 1, 2000, Dr. Pollock restricted plaintiff to light duty including no standing for prolonged periods, no bending and no stooping.

20. On August 4, 2000, defendant-employer informed plaintiff she was terminated and would not be offered any job. . . .

21. Plaintiff contacted defendant-employer's safety director on August 2, 2000 having received light duty restrictions and the ability to return to work.

22. Defendant-employer mailed plaintiff a typed statement indicating she was terminated from defendant-employer on August 11, 2000.

23. Dr. Pollock revised his recommendation for light duty work after the arthroscopic surgery on October 5, 2000.

24. At the time of the hearing before the Deputy Commissioner, plaintiff had not received any vocational rehabilitation from defendant-employer. Plaintiff had a seventh grade education[.] . . .

25. Dr. Pollock indicated plaintiff was unable to work from the date of her injury through May 6, 2003. Dr. Pollock placed restrictions that plaintiff should not return to employment where she would be required to stand for eight (8) hours a day.

26. On June 1, 2001, plaintiff was assigned permanent work restrictions by Dr. Pollock.

27. Plaintiff's right knee condition has not adequately improved and Dr. Pollock has recommended a third arthroscopic surgery. Dr. Pollock is of the opinion plaintiff is disabled and without the third surgery there may not be any possibility of her ability to be able to return to work.

> 28. Dr. Pollock assigned a ten (10%) percent permanent partial disability to plaintiff's right leg on February 13, 2001. David O'Brian, Jr., M.D., concurred with Dr. Pollock's permanent partial disability rating.

Upon these findings, the Commission made the following conclusions of law:

> 1. Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment on January 19, 2000. . . .
>
> 2. As a result of her compensable injury by accident, plaintiff is entitled to temporary total disability compensation[.] . . .
>
> 3. Plaintiff was terminated while plaintiff was released to light-duty work and was still receiving care from her treating physician. Defendant-employer did not make light duty work available to plaintiff. . . .
>
> 4. Defendant is entitled to receive a credit for payment of private disability benefits to plaintiff. N.C.G.S. §97-42.

We conclude that the Commission's findings of fact amply support its conclusion of law that plaintiff suffered a right knee injury on 19 January 2000 arising out of and in the course of her employment. Defendants, however, argue that the Industrial Commission erred by failing to make certain additional findings. We will consider their arguments in turn.

Defendants first contend that the Commission erred by failing to make findings to support its conclusion that plaintiff was injured as the result of an accident. "An accident is 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.'" *Calderwood v. Charlotte Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999) (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983)). "The elements of an accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Adams*, 61 N.C. App. at 260, 300 S.E.2d at 456 (citations omitted). In the instant case, the

Commission's findings of fact set out both the "unlooked for and untoward event" of the buggy wheel becoming stuck in a floor seam, and also the "unexpected consequences" of plaintiff's attempt to dislodge it. This assignment of error is overruled.

Defendants argue next the Commission committed reversible error by failing to make findings regarding the testimony of plaintiff's co-worker Dorothy Brown. Defendants attach great significance to Brown's testimony that plaintiff complained to Brown about her right knee two days before her injury, and contend that Brown's testimony was "crucial" on the issue of whether plaintiff suffered a compensable injury, and was "important in determining the credibility of Plaintiff's testimony." However, plaintiff's **own** testimony, like Brown's, was that when she returned to work after a bout with the flu, the joints of her arms and legs were swollen. Moreover, Dr. Pollock's opinion regarding causation was given in response to a hypothetical question that **included** the assumption that on plaintiff's "return to work after being out approximately two weeks . . . [she had] aches and pains all over her body including her knees - which her right knee had some swelling." Finally, we note that Brown offered no testimony that plaintiff had ever complained about her knee except on 17 January 2000, and no testimony pertaining to plaintiff's credibility or honesty. We conclude that Brown's testimony was not necessary for the Commission to make its determinations, and that "the Commission, in a proper exercise of its discretion, chose not to make exhaustive findings regarding the testimony of [the witness]." *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 65, 546 S.E.2d 133, 140 (2001).

Defendants also assert that the Commission erred by failing to make findings of fact "regarding plaintiff's pre-existing degenerative condition." This argument assumes the existence of competent evidence "establishing a pre-existing condition." However, no medical testimony was presented that plaintiff had ever sought treatment for a knee condition before January, 2000.

Plaintiff's treating physician, Dr. Pollock, concluded that her symptoms were likely caused by the injury at work rather than a pre-existing condition. In a related argument, defendants contend that the medical testimony regarding causation was "speculative." We have reviewed this argument and find it to be without merit.

We conclude that the Commission's findings support its conclusion that plaintiff suffered a compensable injury, and that the Commission did not err by failing to make the additional findings sought by defendants. This assignment of error is overruled.

Defendants argue next that the Commission erred by awarding plaintiff continuing temporary total disability benefits. Defendants contend that plaintiff "failed to carry her burden of proving that her right knee condition caused any disability." We disagree.

Under N.C.G.S. §97-2(9) (2003), "disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Further:

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment . . . [or] (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.] . . .

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684 (citations omitted)).

In the instant case, the Commission found that: plaintiff had only a seventh grade education; she had not been afforded any vocational rehabilitation; in addition to her knee injury

plaintiff suffered from severe acid reflux disease, chronic asthma, chronic bronchitis, high blood pressure, depression and irritable bowel syndrome; plaintiff continued to experience pain and swelling even after her arthroscopic surgery, and; in the opinion of Dr. Pollock, plaintiff "is disabled and without the third [arthroscopic] surgery there may not be any possibility of her ability to be able to return to work." These findings support the Commission's conclusion that plaintiff is disabled, either because she is "physically or mentally, as a consequence of the work related injury, incapable of work in any employment" or because "it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek other employment." *Id.* This assignment of error is overruled.

Finally, defendants argue that the Commission erred by "failing to calculate and award a specific credit amount to defendants for payment of private disability benefits to plaintiff pursuant to [N.C.G.S. §] 97-42." We conclude that defendants have not properly preserved this issue for appellate review.

Pursuant to N.C.G.S. §97-86 (2003), an appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions[, and the] procedure for the appeal shall be as provided by the rules of appellate procedure." Under N.C.R. App. P. 10(a), "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." In this regard, Rule 10(c)(1) requires, in relevant part, that:

> . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the

> attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

Additionally, N.C.R. App. P. 28(b)(6) provides in relevant part that, in an appellant's brief:

> Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

In the instant case, the Commission addressed credit for disability payments in Paragraph 1 of the Industrial Commission's Award, which states:

> 1. Subject to a reasonable attorney's fee herein approved, defendant shall pay temporary total disability compensation to plaintiff at the rate of $186.76 per week for the period beginning January 26, 2000 and continuing until the plaintiff returns to work or until further Order of the Commission. Compensation due which has accrued shall be paid in a lump sum subject to attorney's fees hereinafter provided. Defendants are entitled to receive a credit for the disability compensation that has been paid to plaintiff.

Paragraph 1 thus includes several different rulings. Following the heading for this argument, defendants reference assignment of error No. 17, which assigns error to:

> 17. The Industrial Commission's Award, Paragraph 1, in its entirety, and to the signing and entry of the Award, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, are not supported by the competent evidence . . . of Record, and are contrary to law.

"[Defendants'] assignment of error fails to state the legal basis upon which error is assigned and is not confined to a single issue of law. Rather, the assignment is a broadside attack on the [Commission's Award], not specifying which of the [Commission's] . . . rulings was erroneous. Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. 'This assignment - like a hoopskirt - covers everything and

touches nothing.'" *Wetchin v. Ocean SideCorp*., __ N.C. App. __, __, 606 S.E.2d 407, 409 (2005) (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)). We conclude that defendants failed to preserve for our review the issue of the Commission's crediting them for previous disability payments. This assignment of error is overruled.

As discussed above, we conclude that the Industrial Commission did not err, and that its Opinion and Award should be

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

Report per Rule 30(e).