NO. COA02-832

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2003

PAULA V. FOX,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 049692

WAL-MART STORES, INC.,
Employer,

AMERICAN HOME ASSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from order entered 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Young, Moore and Henderson, P.A., by Dawn Dillon Raynor, for defendants-appellees.

WYNN, Judge.

By this appeal, Paula Fox presents the following pertinent issues for our consideration: Did the Commission err in concluding that: (I) She did not sustain a compensable injury to her elbow under our Workers' Compensation Act and (II) her injuries did not arise to the level of an occupational disease. We affirm the Commission's opinion and award.

At the time of her alleged injury on 7 July 2000, Ms. Fox had been employed as a stocker and zoner at Wal-Mart Stores, Inc. for about two months. As part of her stocking responsibilities, Ms. Fox was required to place products on the shelves from boxes full of products that were initially located on a pallet in the aisle on which the items needed to be stocked. Ms. Fox also had zoning responsibilities, which consisted of straightening each aisle and pulling the products forward on the shelves.

Early in Ms. Fox's employment, she began wearing wrist and elbow braces on each arm, allegedly because of some tingling in her middle finger. On 7 July 2000, while lifting a twelve-pound box of salsa, Ms. Fox felt something pop in her right arm. She sought treatment with the Randolph Hospital Emergency Room, which referred her to Dr. Walha, Ms. Fox's family physician and Wal-Mart's workers' compensation physician.

Dr. Walha diagnosed Ms. Fox as having right lateral epicondylitis, which is tendonitis of the extensor tendons at the elbow, commonly referred to as "tennis elbow."**[Note 1]** Ms. Fox was allowed to return to work on light duty with no lifting over five pounds and no repetitive motion.

Upon Ms. Fox's return to work, Wal-Mart limited her responsibilities to zoning and initially placed her in the health, beauty aids and cosmetics section, which did not require any lifting. Thereafter, Wal-Mart moved her to the soft lines (clothing) department to pick up garments from the floor and hang them up, another form of zoning. She was instructed never to lift more than two pounds. Following her termination as an employee of Wal-Mart on 7 August 2000, Ms. Fox filed a claim for worker's compensation benefits. In an Opinion and Award filed 28 September 2001, Deputy Commissioner Phillip A. Holmes found that Ms. Fox failed to prove that she sustained an injury by accident or developed an occupational disease as a result of her

job duties. Ms. Fox appealed to the Commission, which affirmed Deputy Commissioner Holmes' decision. Ms. Fox appeals to this Court.

I.

Did the Commission err in concluding that Ms. Fox did not sustain a compensable injury to her elbow under our Workers' Compensation Act? We answer, no.

"Under the North Carolina Workers' Compensation act, an injury arising out of and in the course of employment is compensable only if caused by an 'accident' and the claimant bears the burden of proving an accident has occurred." N.C. Gen. Stat. §97-2(6)(2001); *Calderwood v. The Charlotte-Mecklenburg Hospital Authority,* 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999). "An accident is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Id*. "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 v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456(1983).

Plaintiff contends that lifting a twelve-pound case of salsa met the unusual and untoward requirement for an accident because during the course of her employment she usually lifted six-pound cases. "When considering an appeal from the Commission, its findings are binding if there is any competent evidence to support them, regardless of whether there is evidence which would support a contrary finding. Therefore, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law." *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116 (1998).

In this case, the Commission found:

> 14. ... Typically, the boxes weighed no more than thirty-five pounds with an average of twelve pounds.

This finding was supported by David Snider's (plaintiff's supervisor) testimony that the weight of the cases varies with some cases weighing as much as thirty-five pounds. Mr. Snider testified the average weight of the cases on the aisle on which plaintiff was working when injured was probably around six to seven pounds. He also testified that a case of salsa typically weighed around twelve pounds. Plaintiff also testified the salsa case weighed approximately twelve pounds. These facts constitute competent evidence supporting this finding of fact.

Indeed, the record shows that at the time of Ms. Fox's injury, she was engaged in a normal and routine job activity. Although the record indicates she was lifting a twelve-pound case of salsa when the other cases on that aisle averaged six to seven pounds, her supervisor testified that case weight varied upwards to thirty-five pounds and that employees in training, such as plaintiff, would work in several different aisles in order to learn the store. This evidence supported the findings of fact which in turn supported the Commission's conclusion that "plaintiff has failed to prove by the greater weight of the evidence that she sustained a compensable injury by accident ... as a result of her job duties with defendant--employer." Accordingly, we uphold the Commission's decision on this issue.

II.

Did the Commission err in concluding that plaintiff's injuries did not arise to the level of an occupational disease? We answer, no.

Under our Workers' Compensation Act, a disease is compensable as an occupational disease if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, . . . 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)(2001). "Ultimately, the Commission must determine whether the occupational exposure was such a significant factor in the 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 claimant's incapacity for work." *Perry v. Burlington Industries, Inc.*, 80 N.C. App. 650, 654, 343 S.E.2d 215, 218 (1986).

Thus, "there are three elements necessary to prove the existence of a compensable occupational disease: (1) the disease must be characteristic of a trade or occupation, (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 causation." *Id*.

In this case, the Commission concluded "plaintiff has failed to prove by the greater weight of the evidence that she sustained ... an occupational disease as a result of her job duties..." based upon the following findings of fact:

> 21. Dr. Walha was the only expert to testify in this case and when asked whether plaintiff's employment caused her condition, Dr. Walha could not say to a reasonable degree of medical certainty that it had. Instead she answered, "I cannot rule that out, just like anything else."
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> 22. Dr. Walha testified that plaintiff's zoning work would not cause plaintiff's condition unless she was constantly turning the cans without a break. Plaintiff took numerous breaks during her shift and was repeatedly found wandering off from her assigned area to different areas of the store talking with other employees, instead of doing her job. This contributed to her low productivity and is the reason her position at Wal-Mart was terminated. Thus, the zoning work did not cause plaintiff's tendonitis.
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> 23. Dr. Walha testified that there are many possible causes of plaintiff's condition other than her employment at Wal-Mart, including doing household chores, playing tennis, working in the garden, and moving furniture.

> 25. Plaintiff's employment at Wal-Mart did not significantly contribute to the development of tendonitis in her elbow and did not expose her to a greater risk of contracting tendonitis than the general public.

These findings are supported by the testimony from plaintiff's supervisors and Dr. Walha. The transcript shows Dr. Walha testified in the manner described in Findings of Fact 21-23. Plaintiff's supervisors, Mr. Snider and Ms. Smith, testified plaintiff would wander around the store, away from her assigned area, and either talk with co-workers or shop during work hours. Thus, these findings of fact are supported by competent evidence.

Moreover the findings of facts support the Commission's conclusion because plaintiff failed to demonstrate her tendonitis was characteristic of zoning and stocking and failed to establish her tendonitis was not an ordinary disease of life to which the public is equally exposed to outside of employment. Indeed, Dr. Walha testified there were many causes of plaintiff's condition other than her employment at Wal-Mart, including doing household chores, playing tennis, gardening, and moving furniture. These activities are often conducted by many people in the general public and accordingly they are just as susceptible to tendonitis as plaintiff. Accordingly, the opinion and award of the Commission is affirmed.**[Note 2]**

Affirmed.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e).

NOTES

1. Dr. Walha treated Ms. Fox on 11 July, 15 July and 3 August 2000. Ms. Fox did not seek treatment again from Dr. Walha for elbow related problems until 26 July 2001.

2. Plaintiff also contends our decision in *Kanipe v. Lane Upholstery* stands for the proposition that when an employer directs the medical treatment of an injured worker, the employer is thereafter precluded and estopped from subsequently denying the workers'

compensation claim. Recently, this Court in *Harrison v. Lucent Technologies*, ____ N.C. App. ____, 575 S.E.2d 825 (2003) found this argument to be without merit.