NO. COA03-876

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 2004

RONNIE F. DAVIS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 074480

USF HOLLAND,
Employer,

SELF-INSURED
CONSTITUTION STATE
SERVICE COMPANY,
Servicing Agent,
Defendants.

Appeal by plaintiff from opinion and award filed 26 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 March 2004.

Charles G. Monnett, III & Associates, by Craig O. Asbill, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeff Kadis and Shannon P. Herndon, for defendant-appellees.

BRYANT, Judge.

Ronnie F. Davis (plaintiff) appeals an opinion and award from the North Carolina Industrial Commission (the full Commission) filed 26 March 2003, concluding his injury was not compensable under the Workers' Compensation Act because the injury was not caused by an accident.

Plaintiff had been employed with USF Holland (defendant) as a truck driver for nearly eight years. Plaintiff's duties included delivering and picking up freight throughout West Charlotte. On 21August 2000, while driving from his last stop, plaintiff noticed an unclaimed skid of freight remaining on his truck, and called his office dispatcher to notify the office of the unclaimed freight. Plaintiff was told to pull over and retrieve the PRO number from the freight so the office could determine the freight's destination.

Plaintiff pulled onto the side of the road and turned on his safety blinkers. Due to the amount of traffic on the roadway, plaintiff rushed to obtain and report the PRO number to his office. While descending from the driver's seat to walk to the back of the truck, plaintiff held onto the door handle and stepped onto the I.C.C. bar. As plaintiff descended, he felt something snap in his right calf before he reached the ground. Plaintiff immediately reported this incident to his office and went on to complete the remainder of the work day.

When plaintiff awoke the following morning, 22 August 2004, he found his right calf was swollen and he could hardly walk. That same day, plaintiff was treated at Industrial Health Services (IHS) where he was diagnosed with a pulled right calf muscle and released to return to work with no restrictions. After completing the work week, plaintiff experienced significant swelling in his calf and was unable to return to work on 29 August 2000. On 30 August 2000, IHS placed plaintiff out of work for a period of one week.

On 1 September 2000, plaintiff was treated at University Hospital and was told to elevate and ice his calf and to return to the Miller Orthopaedic Clinic or IHS in three-to-five days. Plaintiff did not return for a follow-up appointment at University Hospital or with IHS from 1 September 2000 until 28 December 2000. On 28 December 2000, plaintiff returned to IHS for treatment, and on 27 February 2001, was determined to be at maximum medical improvement.

In response to plaintiff's claim for workers' compensation benefits, defendant filed a Form 61 denying the claim. Plaintiff thereafter filed a Form 33 request for hearing, and defendant filed a Form 33R. This matter then came for hearing before a deputy commissioner on 11 January 2002. By opinion and award filed 18 February 2002, plaintiff was awarded temporary total disability benefits for the period covering 22 August 2000 until 7 February 2001. Defendant appealed to the full Commission.

This matter was heard by the full Commission on 29 August 2002. By opinion and award filed 26 March 2003, the full Commission reversed the award of the deputy commissioner, concluding that plaintiff did not sustain an injury by accident arising out of and in the course and scope of his employment. Plaintiff appealed.

On appeal, plaintiff argues the full Commission erred in: (I) concluding that plaintiff was performing his normal work routine under normal working conditions and did not sustain an injury by accident arising out of and in the course of his employment; and (II) finding that plaintiff was placed out of work on 30 August 2000 for only one week, and did not have contact with his physicians from 1 September 2000 until 28 December 2000. We affirm.

I

"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." *Mouse v. Hexcel-Schwebel*, --- N.C. App. ---, ---, 592 S.E.2d 615, 617 (2004); *see* N.C.G.S. §97-2(6) (2003). "An accident is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Mouse*, --- N.C. App. at ---, 592 S.E.2d at 617. "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 the full Commission erred when it concluded plaintiff did not suffer a compensable injury by accident to his right calf. Opinions and awards of the full Commission are reviewed to determine whether competent evidence exists to support the full Commission's findings of fact, and whether the findings of fact support the full Commission's conclusions of law. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the full Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs,*143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The full Commission's conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

In this case, the full Commission found:

> 3. On August 21, 2000, plaintiff was performing his regular job duties as a truck driver for defendant-employer when he noticed an unclaimed skid of freight remaining on his truck following his last designated stop.
>
> 4. Upon the instruction of plaintiff's dispatcher, plaintiff pulled his truck onto the shoulder of the road, in order to enter the trailer portion of his vehicle to obtain the PRO number of the unclaimed skid of freight.
>
> 5. Although, prior to August 21, 2000, plaintiff had never pulled his truck to the shoulder of the road to inspect freight between stops, plaintiff routinely had climbed up and down from his truck as part of his work routine.
>
> 6. On August 21, 2000, plaintiff was performing his normal work routine without interruption under normal working conditions when he stepped off the end of the truck by using the I.C.C. bar as a step and injured his right calf muscle. Nothing unusual occurred during plaintiff's decent and there was no

> evidence presented that being in a hurry affected the mechanism of his descent. He performed this maneuver on a regular and daily basis.
>
> 7. Pulling over to the side of the road was not an interruption of plaintiff's work routine, which would produce unusual conditions likely to result in unexpected consequences. This injury could have occurred no matter where the truck was parked.

Based upon these findings of fact, the full Commission concluded:

> 1. On August 21, 2000, plaintiff did not sustain an injury by accident arising out of and in the course and scope of his employment with the defendant-employer as he was performing his normal work routine without interruption and under normal work conditions. N.C. Gen. Stat. §97-2(6).

We hold that the full Commission's findings of fact justify its conclusion of law. The record shows that at the time of plaintiff's injury, he was engaged in normal and routine job activities; and the circumstances of plaintiff's injury do not meet the criteria of injury by accident. *See, e.g., Smith v. Burlington Industries*, 35 N.C. App. 105, 239 S.E.2d 845 (1978) (plaintiff injured his back as he was turning to lift two brass bars and our Court held that the Commission properly denied compensation because the evidence showed the plaintiff was doing nothing unusual or different at the time of his injury); *Hewett v. Supply Co.*, 29 N.C. App. 395, 224 S.E.2d 297 (1976) (no compensable accident where evidence merely showed the plaintiff, in climbing out of a cement bin he was painting, moved from a squatting to a standing position); *Southards v. Motor Lines*, 11 N.C. App. 583, 181 S.E.2d 811 (1971) (the factual findings that it was a hot day, the plaintiff dock worker was hurrying, and that the load he lifted weighed 120 pounds, was insufficient evidence to support an accident award). Accordingly, this assignment of error is overruled.

II

Plaintiff argues the full Commission erred in finding that plaintiff was placed out of work on 30 August 2000 for only one week, and did not have contact with his physicians from 1 September2000 until 28 December 2000, because these findings are not supported by competent evidence in the record. We disagree.

The record includes, as part of exhibit 1, a note from IHS dated 30 August 2000. Under the header "RETURN TO WORK STATUS," a check mark was placed next to the option "Unable to work." Under the option "Unable to work," the note reads "Anticipated length of time away from work (prognosis) ____." The term "1 week" was written in the blank next to "(prognosis)." Therefore, competent evidence exists to support the full Commission's finding that plaintiff was placed out of work on 30 August 2000 for only one week.

Plaintiff argues he continued to receive, via telephone from IHS, treatment instructions and orders not to work from 1 September 2000 until 28 December 2000, but IHS had no records of the alleged instructions or orders to stop working. They did have detailed records, however, of its order on 30 August 2000 for plaintiff to stop working for one week, as well as records of phone calls by plaintiff cancelling appointments at various times. Therefore, the lack of records indicating contact with his physicians between 1 September 2000 and 28 December 2000 is competent evidence plaintiff did not have contact with his physicians during that time. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).