IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1108

Filed: 7 June 2016

North Carolina Industrial Commission, I.C. No. 14-706944

RONALD G. KEATON, JR., Employee, Plaintiff,

v.

ERMC III, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Carrier (CARL WARREN & COMPANY, Third-Party Administrator), Defendants.

Appeal by Defendants from opinion and award entered 16 July 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 March 2016.

Davis and Hamrick, L.L.P., by Shannon Warf Wilson, for Plaintiff.

Hedrick Gardner Kincheloe & Garafalo, LLP, by M. Duane Jones and Joseph D. Delfino, for Defendants.

STEPHENS, Judge.

This appeal by an employer and insurer from an opinion and award of the North Carolina Industrial Commission ("the Commission") present two questions: (1) whether an employee's workplace ankle injury arose out of and in the course of his employment and (2) whether the employee's later-occurring shoulder condition was causally related to his ankle injury. Applying our standard of review and well-

established precedent, we answer both questions in the affirmative, and, accordingly, we affirm the opinion and award.

Factual and Procedural Background

Plaintiff Ronald G. Keaton, Jr., began working for Defendant-employer ERMC III ("ERMC") as a maintenance supervisor in November 2013. The Commission's unchallenged findings of fact reveal that:

> 3. [ERMC's] job description for the maintenance supervisor position indicates [Keaton] was required to "replace light bulbs and ballasts, repair electrical outlets and [do] simple re-wiring." As a maintenance supervisor, [Keaton] was also required to frequently operate "potentially dangerous equipment" and climb ladders. In keeping with the formal job description, [Keaton] had, prior to January 8, 2014, replaced wiring, ballasts, bulbs and light fixtures for [ERMC], and as of January 8, 2014, he was "used to working around live electrical lines . . . ."
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> 4. In the course of his employment with [ERMC], on January 8, 2014, [Keaton] received an emergency call to report to one of the mall's loading docks where a sprinkler head in the ceiling had burst and was pouring hundreds of gallons of water through the suspended ceiling onto the floor. . . .
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> 5. When [Keaton] arrived at the loading dock area, he and his supervisor, Jeff Brown, went to the riser room to turn off the water and gather shovels, brooms, and dustpans to clean up the debris that had fallen onto the floor. In addition to the water and debris from the ceiling, there was a 5- to 6-foot fluorescent light fixture hanging from the ceiling in front of the double doors people used to go in and out of the loading dock. There was water dripping from the light fixture, which was still energized. [Keaton] was joined at the scene by Zach Spillman, an HVAC

technician who worked for [ERMC] and over whom [Keaton] had supervisory authority. . . .

6. After most of the water and debris was cleaned up, [Keaton] borrowed a ladder from a nearby store and began using it to take down the damaged ceiling grid. Mr. Brown was present when [Keaton] began using this ladder and did not instruct him to use one of [ERMC's] ladders or to utilize fall protection equipment while on the ladder. Mr. Brown was the operations director, site manager for [ERMC] at that time, as well as [Keaton's] supervisor.

7. Mr. Brown told [Keaton] and Mr. Spillman that it looked like they had the situation under control, so he was going to lunch. Prior to Mr. Brown leaving for lunch, Mr. Spillman heard Mr. Brown tell [Keaton] not to touch the damaged fluorescent light that was hanging from the ceiling. Two other witnesses on the scene also overheard Mr. Brown tell [Keaton] and Mr. Spillman not to touch the light fixture. Even though [Keaton] was in close proximity when this statement was made, he does not recall hearing Mr. Brown tell him not to touch the light fixture. [Keaton's] testimony in this regard is accepted as credible.

8. [Keaton] was concerned that the energized light fixture in front of the doors posed a safety hazard to people coming and going through the doors. While [Keaton] was aware of the danger posed by working on live electrical wires in the presence of water, he "didn't consider this [taking down the light] a major thing." [Keaton] testified that "it's a simple 3 wires,. . . a hundred and ten volt line." [Keaton] did not see any reason to ask for permission to take down the light fixture because "this wasn't anything technical, . . . this was cleanup."

9. Mr. Brown was at lunch and not present when [Keaton] finished taking down the damaged ceiling grid and began taking down the light fixture. There was no standing water on the floor when [Keaton] began working on the light fixture. Using the same ladder he had been

> using in Mr. Brown's presence, which had a non-conductive top but lacked non-conductive steps and sides, [Keaton] climbed up the ladder and began working on the wires to the fixture with noninsulated pliers. As he was attempting to twist off the "hot wire" after taking out and recapping the ground wire and neutral wire, [Keaton's] pliers touched a live wire, causing a shock, which caused him to jump back off the ladder. As a result of jumping off the ladder, [Keaton] sustained an injury to his right ankle . . . .
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> 10. After he fell off the ladder, [Keaton] instructed Mr. Spillman to get the lineman's insulated pliers from the tool room and cut the last wire. Even though Mr. Spillman testified that he had heard Mr. Brown tell them not to touch the light, he went ahead and cut the light down and taped off the end of the wire to make sure it was safe.
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> 11. When Mr. Brown arrived back at the mall after lunch, he was advised that there had been an accident on the loading dock. [Keaton] admits that when Mr. Brown returned to the loading dock, the first thing he said was something to the effect, "I told you not to touch the light." [Keaton] was subsequently written up for insubordination and unauthorized use of personal equipment, but Mr. Spillman was not written up for completing the job [Keaton] had started.
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> 12. The fact that the manner in which [Keaton] attempted to take down the light fixture violated ERMC rules contained in both the ERMC Employment Policy Manual and the ERMC Electrical Safety Program is irrelevant, inasmuch as there is no evidence of record that any of these rules were "approved by the Commission . . . prior to the injury," as is required by N.C. Gen. Stat. § 97-12.

(Ellipses inside quotation marks in original). After his fall, Keaton was initially treated at an urgent care medical facility, where X rays revealed that Keaton had

fractured his right ankle. Keaton was then transferred to the emergency room of Forsyth Medical Center, where the physician on call confirmed the fracture and admitted Keaton to the hospital pending surgical repair of the ankle. D. Scott Biggerstaff, M.D., an orthopedic specialist, performed an open reduction internal fixation of what Biggerstaff described as Keaton's "severe" right ankle fracture on 20 January 2014. On 23 January 2014, Keaton was discharged from Forsyth Medical Center to Libertywood Nursing Center, where he remained through 24 February 2014. After his discharge from Libertywood, Keaton continued to be treated by Biggerstaff. On 4 August 2014, Biggerstaff "diagnosed . . . left shoulder impingement syndrome, the latter of which he testified, . . . [was] causally related to [Keaton]'s prolonged use of crutches." Biggerstaff gave Keaton a cortisone injection to treat his left shoulder, "discussed the possibility of hardware removal and fusion of the ankle, and continued to write [Keaton] out of work due to the injury to his ankle." The Commission further found:

> 15. As a result of the injury he sustained to his right ankle on January 8, 2014, [Keaton] has been unable to earn any wages in any employment since the date of injury. He remains physically incapable, as a result of his injury, of working in any capacity.
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> 16. With the exception of the speech therapy treatment [Keaton] received at Libertywood, all of the medical treatment [Keaton] has received for his right ankle and left shoulder since the date of injury has been reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to the January 8, 2014 injury by

> accident. [Keaton] has not yet reached maximum medical improvement from these injuries.
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> 17. [Keaton's] actions in trying to take down the broken light fixture were reasonably related to the accomplishment of the task for which he was hired. [Keaton] was acting in furtherance of [ERMC's] business, and while his actions may have been in disobedience of a prior order, they were not in disobedience of a direct and specific order of a then present superior. Therefore, the injury [Keaton] sustained on January 8, 2014 arose out of and in the course of his employment with [ERMC].

On the basis of these findings, the Commission awarded benefits to Keaton. From the opinion and award the Commission entered on 16 July 2015, ERMC and its carrier, New Hampshire Insurance Company (collectively, "Defendants"), appeal.

Discussion

Defendants bring forward two arguments on appeal: that the Commission erred in concluding that (1) Keaton's ankle injury arose out of and in the course of his employment and (2) Keaton's shoulder condition was causally related to his ankle injury. We affirm.

I. Standard of review

Our review of an opinion and award of the Industrial Commission

> is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. Th[e appellate] court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding.

Richardson v. Maxim Healthcare/Allegis Grp., 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and internal quotation marks omitted; emphasis added), *rehearing denied*, 363 N.C. 260, 676 S.E.2d 472 (2009).

> The findings of fact by the Industrial Commission are conclusive on appeal if supported by *any* competent evidence. However, the determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence.

Gallimore v. Marilyn's Shoes, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (citations omitted; emphasis added). "The Commission is the *sole* judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (emphasis added).

II. Conclusion that Keaton's ankle injury arose out of and in the course of employment

Defendants first argue that the Commission erred in concluding that Keaton's ankle injury arose out of and in the course of his employment. We disagree.

"For an injury to be compensable under our Workmen's [sic] Compensation Act ["the Act"] . . . , the claimant must prove three elements: (1) That the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment." *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531 (citations omitted). Under the Act, an "accident" is "an unlooked for and untoward event which is not expected or designed by the person who suffers

the injury . . . ." *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (citations and internal quotation marks omitted), *appeal dismissed*, 364 N.C. 435, 702 S.E.2d 216 (2010).

> The phrases "arising out of" and "in the course of" one's employment are not synonymous but rather are two separate and distinct elements both of which a claimant must prove to bring a case within the Act. In general, the term "in the course of" refers to the time, place[,] and circumstances under which an accident occurs, while the term "arising out of" refers to the origin or causal connection of the accidental injury to the employment.

Gallimore, 292 N.C. at 402, 233 S.E.2d at 531 (citations omitted). Defendants concede that Keaton's fall from the ladder was an accident, but contest the Commission's determination regarding the second and third elements of a compensable injury. We are not persuaded.

In advancing their argument, Defendants do not contend that any of the Commission's "pure" findings of fact are not supported by competent evidence. Accordingly, findings of fact 1-16 quoted above are binding on appeal. *See id.* Defendants challenge only the portion of denominated finding of fact 17 stating that Keaton's injury sustained in falling from the ladder "arose out of and in the course of his employment with" ERMC. As noted *supra*, such a determination "is a mixed question of law and fact, [and we] review the record to determine if the findings and conclusions are supported by sufficient evidence." *Id.* Defendants' argument on this issue is unavailing, however, in that they essentially ask us to second-guess the

Commission's credibility determinations, something we may not do. *See Anderson*, 265 N.C. at 434, 144 S.E.2d at 274; *see also Richardson*, 362 N.C. at 660, 669 S.E.2d at 584.

The critical factual question in resolving the issue of whether Keaton's injury arose out of and in the course of his employment is whether Keaton heard Brown, his supervisor, give him a specific and direct order not to touch the energized light fixture just before Keaton touched and was shocked by the fixture, resulting in his fall from the ladder. *See Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 259, 293 S.E.2d 196, 202 (1982) (holding that "disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury") (citations omitted). Defendants correctly note that the deputy commissioner who conducted the hearing in this matter found Keaton's testimony on this point—that he did not hear Brown give the instruction—not credible, while the Full Commission "reversed this finding [of fact] and concluded that [Keaton's] testimony that he did not hear the instruction was credible testimony." Noting that a plaintiff bears the burden of proving each element of compensability under the Act, *see generally Harvey v. Raleigh Police Dep't*, 96 N.C. App 28, 384 S.E.2d 549, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), by the greater weight or a preponderance of the evidence, *see, e.g.*, *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463

S.E.2d 259, 261 (1995), *affirmed per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996), Defendants contend that

> the Commission did not deem [Keaton's] testimony credible, and then discredit the other testimony. The preponderance of the evidence still shows [Keaton] was given and heard the instruction. At a minimum, this situation would seem to illustrate why the . . . Commission should give an explanation when it decides to overturn findings of credibility by the hearing officer who actually heard the testimony.

We express no opinion about this suggestion as it falls well outside our highly constrained standard of review of an opinion and award of the Commission. Such an argument is more properly directed to our General Assembly.

Relying on our Supreme Court's decision in *Hoyle*, Defendants further contend that, even in light of the Commission's finding that his testimony was credible, Keaton did not establish that his injury arose out of his employment because

> [t]he evidence still shows [Keaton] was given the instruction immediately before he violated that instruction. The evidence still shows [Keaton's] actions in attempting to take down the light fixture also violated numerous other ERMC Rules contained in both the ERMC Employment Policy Manual, which [Keaton] acknowledged that he read and understood, and the ERMC Electrical Safety Program, which [Keaton] indicated he was familiar with and was bound to follow. . . . [T]hese rules show it was outside the course and scope of [Keaton's] employment, and was not in furtherance of the employer's business or for the employer's benefit.

While we agree that the *Hoyle* decision controls the outcome of this issue, we conclude that *Hoyle* requires us to affirm the Commission's opinion and award. First, regarding Keaton's alleged "violation" of Brown's instruction not to touch the light fixture, although "disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury[,]" *Hoyle*, 306 N.C. at 259, 293 S.E.2d at 202 (citations omitted), an employee plainly cannot "disobey" an order he does not hear and is therefore unaware of. The Commission found as fact that Keaton was credible when he testified that he did not hear Brown's instruction not to touch the light fixture, and thus, he did not disobey "a direct and specific order by a then present superior . . . ." *See id.* (citations omitted). As for Keaton's alleged violation of his employer's standing safety rules and policies, the *Hoyle* Court specifically addressed that situation as well, holding that,

> when there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts. Under such circumstances, *engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment*.

Id. at 259, 293 S.E.2d at 202-03 (citations omitted; emphasis added). The reasoning for this holding was straightforward:

> It is neither the role of the Industrial Commission nor of [the appellate courts] to enforce the employer's rules or orders by the denial of Worker's Compensation. Enforcement of rules and orders is the responsibility of the employer, who may choose to terminate employment or otherwise discipline disobedient employees. [The appellate courts] will not do indirectly what the employer failed to do directly.

Id. at 260, 293 S.E.2d at 203. In sum, as this Court held in a case applying *Hoyle*,

> benefits should be awarded under the Act where the injured employee was acting in furtherance of his employer's business to any appreciable extent, albeit in disobedience of the employer's established rules or order, and the injury did not arise while the employee was either thrill seeking or disobeying a direct order, by a then present superior, not to undertake an unreasonably dangerous or wholly unrelated job activity.

Spratt v. Duke Power Co., 65 N.C. App. 457, 465, 310 S.E.2d 38, 43 (1983).

Here, the Commission found as fact that: (1) Keaton's job description included, *inter alia*, repairing and working with light fixtures; (2) Keaton had undertaken such repairs without incident many times during his employment with ERMC; (3) on 8 January 2014, Keaton was called to the site of the leak to clean up the affected area of the loading dock; (4) the still-energized light fixture was hanging in front of a door to the loading dock; (5) Keaton believed that, if left hanging, the fixture posed a danger to people using the door; (6) Keaton believed he could remove the fixture safely as part of cleaning up the loading dock; (7) Keaton did not hear his supervisor tell him not to touch the light fixture; and (8) Keaton was injured while trying to remove

the fixture. These findings of fact indicate that Keaton sustained his injury while "acting in furtherance of his employer's business to an[] appreciable extent, [even if] in disobedience of the employer's established rules or order, and the injury did not arise while the employee was either thrill seeking or disobeying a direct order, by a then present superior . . . ." *Id.* Accordingly, Keaton's ankle injury is compensable as a matter of law. Defendants' argument that the Commission erred as a matter of law in so concluding is overruled.

III. Causal relation between Keaton's shoulder condition and his ankle injury

Defendants next argue that the Commission erred in finding as fact that Keaton's left shoulder condition was causally related to the ankle injury he sustained when he fell off the ladder. We disagree.

"A subsequent injury to an employee, whether an aggravation of the original injury or a new and distinct injury, is compensable only if it is the direct and natural result of a prior compensable injury." *Vandiford v. Stewart Equip. Co.*, 98 N.C. App. 458, 461, 391 S.E.2d 193, 195 (1990) (citation omitted). Thus, to be covered by the Act, an employee's medical condition must be reasonably related to his compensable injury resulting from a workplace accident, a matter the employee must prove by a preponderance of the evidence. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003). Where an injury implicates "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) (citations omitted). "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. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Rather, "[t]he evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (citation and internal quotation marks omitted).

The Commission's opinion and award includes finding of fact 14:

> Since his release from Libertywood, [Keaton] has continued to treat with Dr. Biggerstaff. On August 4, 2014, *Dr. Biggerstaff diagnosed right ankle arthritis in a patient with ankle non-union and left shoulder impingement syndrome, the latter of which he testified, and the Full Commission finds, is causally related to* [*Keaton's*] *prolonged use of crutches*. Dr. Biggerstaff administered a cortisone injection to [Keaton's] left shoulder, discussed the possibility of hardware removal and fusion of the ankle, and continued to write [Keaton] out of work due to the injury to his ankle.

Defendants acknowledge that Biggerstaff testified that Keaton's shoulder condition was causally related to his ankle injury, but contend that, because there is no evidence in the record that Keaton used crutches at all, let alone for a prolonged

period of time, Biggerstaff's opinion was based upon an unfounded assumption or unsupported speculation.

As an initial matter, we note that there *is* evidence in the record that Keaton used crutches.[1] At the 22 July 2014 hearing before the deputy commissioner, almost seven months after his injury, Keaton was using crutches, as indicated by the transcript of that proceeding. Thus, the use of crutches predates Keaton's first reports of shoulder pain. At Biggerstaff's deposition on 15 October 2014, the doctor noted that Keaton first mentioned his shoulder pain at an appointment on 4 August 2014 and that he reported the shoulder was still bothering him at his 14 October 2014 appointment, more than seven weeks after the hearing.

Regarding the basis for his opinion on causation, on direct examination Biggerstaff stated that he could not recall whether Keaton used crutches or a wheelchair during the period of time when he was in a non-weight-bearing cast for his ankle injury. However, on cross-examination, the following exchange took place:

> Q. Now, I want to ask you about Mr. Keaton's complaints of shoulder pain.
>
> A. Okay.
>
> Q. The records don't seem to indicate a reason for the shoulder pain. What is the reason for Mr. Keaton's shoulder pain?

[1] Keaton also mentioned having used a walker at some point during his recovery from the ankle injury.

> A. You know, it's possible—I mean, probably the most likely reason is him being on crutches for—I think at the time when he first complained of it, it was at his August visit. It was either his August or July visit. Let me see.
>
> Q. I believe he first reported it in August.
>
> A. Okay. So if his injury happened in January, so approximately seven months, you know, I mean, I think that it is possible that using the crutches for seven months is—you know, would cause irritation and pain initially.
>
> Q. It is more likely than not it's a result of using the crutches?
>
> A. I mean, I would—with the information that I have, yes.
>
> Q. Did Mr. Keaton indicate to you that it was because he was using crutches, or he thought it was because he was using crutches?
>
> A. No, he did not, not that I know.
>
> Q. Are his complaints of shoulder pain typical for somebody who has been using crutches?
>
> A. It can be, yes.
>
> Q. Once Mr. Keaton no longer uses crutches, will his shoulder pain likely resolve on its own?
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> A. Honestly, I think that's a difficult question to answer. I just don't know if it will.

This series of questions and answers suggests that both Biggerstaff and Defendants' counsel believed that Keaton *had* been using crutches, possibly for as long as seven months. This exchange, along with definitive evidence in the record that Keaton did

use crutches during his recovery from the ankle injury, takes Biggerstaff's causation testimony regarding Keaton's shoulder condition "out of the realm of conjecture and remote possibility, [such that] there [is] sufficient competent evidence tending to show a proximate causal relation." *See id.* (citation and internal quotation marks omitted). Thus, competent evidence in the record supports the Commission's factual finding that a causal relationship existed between Keaton's use of crutches due to his compensable ankle injury and his subsequent left shoulder condition. Accordingly, we overrule Defendants' argument to the contrary.

The opinion and award of the Commission is

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).