IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1275

Filed: 3 March 2020

Industrial Commission, I.C. No. 16-024794

KIMBERLY CUNNINGHAM, Employee, Plaintiff,

v.

PRINCIPLE LONG TERM CARE, INC., Employer, and PMA Management Group, Carrier, Defendant.

Appeal by Plaintiff from opinion and award entered 21 August 2018 by the Industrial Commission. Heard in the Court of Appeals 20 August 2019.

*Law Office of Gary A. Dodd, by Gary A. Dodd, for the Plaintiff-Appellant.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Neil P. Andrews, for the Defendant-Appellee.*

McGEE, Chief Judge.

Kimberly Cunningham ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission concluding that injuries Plaintiff suffered while working for Principle Long Term Care, Inc. ("Defendant"), were not the result of an accident. We vacate the opinion and award and remand to the Industrial Commission for additional findings of fact.

## I. Factual and Procedural Background

Plaintiff began working for Defendant as a certified nursing assistant ("CNA") in December 2006. Between 2006 and 2016, Plaintiff's job duties as a CNA for Defendant consisted primarily of grooming, showering, and dressing 12 to 17 patients each workday.

Plaintiff was assigned on 23 May 2016 to assist a normal schedule of 17 patients. Plaintiff showered the first 16 patients without complication. Plaintiff's last patient on May 23 was a man whom Plaintiff had assisted many times, who used a wheelchair at all times and weighed around 240 pounds.

Plaintiff transported the patient to the assigned shower room and underwent the following, normal routine for bathing a patient: she moved the patient's wheelchair alongside a wheeled PVC shower chair; locked the wheels on each chair; lowered the side rails on one side of each chair; and slid the patient from his wheelchair onto the shower chair. Plaintiff showered and dressed the patient, then began the same routine to transfer him back to his wheelchair. The patient raised up out of the chair as Plaintiff attempted to move him, then abruptly sat back down and caused the shower chair to crack. The patient began to "teeter" on the edge of the cracked shower chair. Plaintiff "grabbed a hold of [the patient's] pants, the back of his pants in the leg, and [] pulled on him to keep him from going off into the floor." Plaintiff strained to stabilize the patient, realizing she would not be able to safely

complete the transfer by herself. She pressed her emergency button and waited for assistance before transferring the patient from the cracked shower chair into his wheelchair. Plaintiff felt "a little pain" and a "little tugging feeling" in her neck after completing care of the patient, but "didn't think nothing about it."

That same evening, Plaintiff awoke from a nap to find her neck swollen and sore because a "big knot" had developed on the left side of her neck. Plaintiff went to work the next morning but was instructed to seek medical care when her supervisor saw the condition of her neck. Plaintiff initially sought treatment at a local clinic, which referred her to Dr. Douglas, an ear, nose, and throat specialist. Dr. Douglas aspirated the mass on Plaintiff's neck on 24 May 2016, then instructed her to seek follow-up care with another ear, nose, and throat specialist, Dr. Kosnik.

Plaintiff had first seen Dr. Kosnik in 2010 in association with a cyst on the left side of her neck. Dr. Kosnik determined the cyst was caused by a genetic condition called Hashimoto's thyroiditis. At that time, the cyst manifested as a small knot without any swelling. Dr. Kosnik aspirated the cyst, and Plaintiff experienced no further problems with her thyroid or the related cyst until May 2016. The 2010 cyst did not cause Plaintiff to miss work.

On 2 June 2016, Dr. Kosnik determined Plaintiff had a "large left recurrent thyroid cyst" similar to the cyst he treated in 2010, and noted that the cyst would "ultimately require excision." Dr. Kosnik performed a total thyroidectomy removing

Plaintiff's thyroid and cyst on 26 July 2016. Plaintiff returned to her normal work duties on 15 August 2016, but will require indefinite hormone replacement medication and periodic treatment as a result of her removed thyroid.

Defendants denied Plaintiff's claim for workers' compensation, stating no accident occurred while Plaintiff was working and her injury was, instead, the result of a recurring cyst. A deputy commissioner entered an opinion and award on 17 October 2017 concluding that "Plaintiff presented sufficient evidence of an 'accident' arising out of and in the course of her employment on May 23, 2016[,]" and that "her accident [] caused the injury to her thyroid." The deputy commissioner awarded Plaintiff temporary total disability benefits and all related medical treatment costs. Defendant appealed to the Full Commission. The Full Commission entered an opinion and award on 21 August 2018 reversing the deputy commissioner's decision and denying Plaintiff recovery, concluding that "Plaintiff did not sustain an injury by accident on May 23, 2016," and her claim was therefore "not compensable." Plaintiff appeals.

## II. Analysis

Plaintiff's sole argument on appeal is that the Industrial Commission erred in concluding that she "did not sustain an injury by accident" on 23 May 2016.

Our review of the Industrial Commission's decision is limited to (1) whether its findings of fact are supported by competent evidence and (2) whether its conclusions

of law are supported by those findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). Though we review the Commission's conclusions of law *de novo*, *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat'l Can Corp.,* 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original).

Under the Workers' Compensation Act, an employee may recover for an injury where the employee proves the injury was caused "(1) by accident; (2) arising out of employment; and (3) in the course of employment." *Wilkes v. City of Greenville*, 369 N.C. 730, 737, 799 S.E.2d 838, 844 (2017) (internal marks omitted) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)); N.C. Gen Stat. § 97-2(6) (2015).

For the purposes of workers' compensation, our Courts have defined an accident as: "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991) (quotation omitted). "If an employee is injured while carrying on his [or her] usual tasks in the usual way the injury does not arise by accident." *Gunter v. Dayco Corp.,* 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986) (citation omitted). Rather, an accident may follow where an employee's usual routine is interrupted by "unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 429, 124 S.E.2d 109, 111 (1962). "Thus, in order to be a compensable 'injury by accident,' the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way." *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (citation omitted). "[O]nce an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville,* 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

Plaintiff contends the Full Commission failed to consider all of the evidence in making its findings of fact and conclusions of law. Plaintiff specifically challenges the Full Commission's findings of fact 23 and 24:

> 23. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that on May 23, 2016, Plaintiff was performing her normal job duties in her usual and customary way. The Full Commission finds that the act of [the patient] nearly falling off the shower chair and Plaintiff having to grab and pull on his pants to prevent him from falling [] was not an unexpected event nor was it an interruption of Plaintiff's normal work routine as residents routinely fell during shower time and it was a part of Plaintiff's normal job duties as a shower team member to anticipate and/or prevent residents from falling during shower time "every day." Further, through Plaintiff's own admission, the grab and pull maneuver she used on [the patient] was a maneuver that complied with [Defendant's] standard operating procedures to prevent resident falls and one that she routinely used as a part of her normal job duties. Plaintiff also admitted that she had used this maneuver on [the patient] on previous occasions to prevent him from falling during shower time. Therefore, the Full Commission finds that Plaintiff did not sustain an injury by accident on May 23, 2016, for which she would be entitled to benefits.
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> 24. The Full Commission further finds that Plaintiff failed to offer evidence to establish that the grab and pull maneuver she used on May 23, 2016, required unusual exertion as compared to other times she was required to use the maneuver to prevent residents from falling. Plaintiff admitted that she had previously used the maneuver on [the patient] who weighed over 200 pounds. With regard to the other residents, there is no evidence of record regarding how often Plaintiff performed the grab and pull maneuver on residents weighing the same or more than [the patient].

Plaintiff also challenges conclusion of law 4:

> 4. Therefore, the Full Commission concludes that Plaintiff did not sustain an injury by accident on May 23, 2016, for which she would be entitled to benefits. N.C. Gen. Stat. § 97-2(6).

Although the final sentence in finding of fact 23 is more properly read as a conclusion of law, the actual findings of fact in finding 23 are reasonably supported by competent evidence before the Commission. As noted by the Commission, Plaintiff testified that saving patients from falling is part of her daily routine. She bathed patients who had a risk of falling on a daily basis and had to make sure "every day" that those patients did not fall. She further explained that it was her "first priority" to ensure the patients' safety and to "make sure they don't slide [or fall] off the chair every day." Plaintiff testified that she had received training on how to appropriately assist a patient in danger of falling and identified using the grab-and-pull maneuver on the patient's pants as the normal, recommended procedure. Specifically, Plaintiff had employed this maneuver on this same patient once or twice before and experienced no overly strenuous activity or difficulties due to his weight.

However, finding of fact 24 is unsupported by the evidence in that the Commission's findings, including those unchallenged by Plaintiff, suggest that the Commission failed to consider all evidence before it. *Weaver,* 123 N.C. App. at 510, 473 S.E.2d at 12 ("The Industrial Commission may not discount or disregard any

evidence, but may choose not to believe the evidence *after* considering it."). Because the Commission appears to have not considered all of the evidence, conclusion of law 4 and the last sentence in finding of fact 23 are unsupported by the findings of fact.

The Full Commission failed to make any reference in its findings of fact to Dr. Kosnik's testimony corroborating Plaintiff's position that the events allegedly causing her injury created an emergency circumstance. In *Weaver*, the Industrial Commission found that, "[s]ince [the] plaintiff's testimony [was] not credible," there was no compensable injury, but made no findings of fact or conclusions of law with respect to testimony from two of plaintiff's coworkers who each corroborated plaintiff's testimony. *Id.* This Court vacated and remanded the Commission's opinion and award denying plaintiff coverage, holding that it was clear from the Commission's findings, or lack thereof, that they had failed to properly consider the coworkers' testimony. *Id.* at 511, 73 S.E.2d at 12.

In the present case, the Full Commission's remaining, unchallenged findings of fact recount Plaintiff's employment and medical history, the events of 23 May 2016, and Plaintiff's testimony before ultimately determining that Plaintiff "failed to offer evidence to establish" that an accident occurred. The Commission makes no reference to Dr. Kosnik's deposition testimony corroborating Plaintiff's assertions that an accident did occur that caused her injuries. In his deposition, Dr. Kosnik opined that it "[stood] to reason" that Plaintiff's "normal job activities" would not "cause a cyst on

a thyroid[.]" Dr. Kosnik also stated his opinion that "it [was] very plausible to accept the fact that [Plaintiff's injury] was related to [a] strenuous event[.]" But the only mention of Dr. Kosnik in the Full Commission's findings of fact is in reference to his treatment of Plaintiff's injury. The summary nature of finding of fact 24 illustrates that the Full Commission failed to consider Dr. Kosnik's deposition testimony.

Further, the Commission failed to show that it considered the condition of the patient's shower chair, and the chair's contribution, if any, to the existence of an emergency circumstance. Our Courts have held that an unexpected event in an employee's routine may cause an accident. *See Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 626–27, 599 S.E.2d 593, 597–98 (2004) (holding an employee's knee injury, after a van step which was "unexpectedly short and too close to the ground" "caus[ed] her to 'misstep' and hit the ground harder than she expected" when she exited a van, constituted an accident); *Ross v. Young Supply Co.*, 71 N.C. App. 532, 536, 322 S.E.2d 648, 652 (1984) (holding facts supported an accident where an employee slipped while maneuvering himself "into a different automobile than his usual vehicle and was doing so in a different manner than normal to compensate" for the change in his usual circumstances). On the other hand, an injury resulting from an employee's routine, work-focused activities does not qualify as a compensable accident. *Harding*, 256 N.C. at 429, 124 S.E.2d at 111 (holding no accident occurred

where delivery driver suffered back pain while lifting goods during a routine delivery).

In this case, Plaintiff reported in her Form 18 initiating workers' compensation proceedings that the "[p]atient sat up on [the] shower chair and then leaned back hard and fast causing [the] shower chair to break." Defendant submitted identical language to the Full Commission in its subsequent Form 19. Both the Form 18 and 19 were included in the materials before the Full Commission. Plaintiff also established in her testimony before the Commission that she occasionally has "trouble with those [PVC shower] chairs failing[.]" Plaintiff later confirmed that "[o]nce there's a little crack in the PVC" the chairs are "taken out of service[,]" and "this one was taken out of service after [the May 23 incident] happened[.]" However, the Commission made no findings with respect to whether it believed the chair cracked during Plaintiff's attempt to transfer the patient back to his wheelchair, nor whether it believed this factor contributed to Plaintiff's need to use strenuous force.

Plaintiff further testified that, after she got the patient "stable in the [cracked] chair[,]" she "hit [her] emergency button and got help . . . [b]ecause [she saw she] wasn't going to be able to complete the transfer by [her]self." The Commission's findings of fact also make no reference to Plaintiff's use of her emergency button, and whether this may have, in and of itself, indicated the potentially unusual nature of the circumstances in this case.

Bathing the patient and occasionally saving him from falling, though potentially strenuous activities, were normal behaviors that were part of Plaintiff's daily routine. Nonetheless, the cracking of a shower chair could "create unusual conditions likely to result in unexpected consequences." *Harding*, 256 N.C. at 429, 124 S.E.2d at 111; *see also Konrady*, 165 N.C. App. at 626, 599 S.E.2d at 597 ("[T]he issue is not whether exiting vans is routine for [the plaintiff], . . . but whether something happened as she was exiting that particular van on that specific occasion . . . that was not normal."). For instance, while Plaintiff was used to using the grab-and-pull maneuver on this patient while he was sufficiently supported by a shower chair, a cracked chair could cause an emergency requiring additional strenuous force. Plaintiff was used to the showering process, but, much like an unusually short step or an unfamiliar vehicle, Plaintiff may not have been comfortable employing her safety practices when damaged equipment was involved. Indeed, the evidence showed that Plaintiff did not believe she could complete the patient's transfer back to his wheelchair alone, pressed the emergency button, and waited for assistance before continuing. Without any indication as to whether the Full Commission considered the condition of the patient's shower chair and her need to call for emergency assistance, we conclude that finding of fact 24 was not supported by the evidence and conclusion of law 4 was not supported by competent findings of fact.

We do note, briefly, that the Industrial Commission is not required to make findings explicitly explaining what evidence it finds to be credible:

> [It is] clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

*Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116–17, 530 S.E.2d 549, 553 (2000). We do not hold that the Commission had a duty to make explicit findings with respect to whether it found Dr. Kosnik's testimony or the possible cracking of the patient's shower chair credible. Rather, given the lack of reference to this evidence, we hold that there is no indication in the Commission's findings of fact and conclusions of law that it considered all of the evidence before making its determinations.

## III. Conclusion

We hold that the Full Commission's findings of fact show that it failed to at least consider all the evidence before making its decision. We remand with instructions to make additional findings of fact considering Dr. Kosnik's deposition testimony and whether the cracking of the patient's chair constituted an accident creating Plaintiff's strenuous activity and exertion, as defined in the Workers' Compensation Act. On remand, the Commission may hear additional evidence as needed. If, after considering all the evidence, the Commission finds that the

circumstances of this case constituted an accident, we leave further determination of whether Plaintiff's injury was causally related to that accident to the Commission.

VACATED AND REMANDED.

Judges STROUD and BROOK concur.

Report per Rule 30(e).