IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1044

Filed: 19 May 2020

I.C. No. 16-031771

KEITH BRIM, Plaintiff,

v.

HARRIS TEETER and SEDGWICK CLAIMS MANAGEMENT SERVICES, t/p/a, Defendants.

Appeal by defendants from Opinion and Award entered 15 August 2019 by the Industrial Commission. Heard in the Court of Appeals 28 April 2020.

The Deuterman Law Group, P.A., by Casey Francis and Jack P. Waissen, for plaintiff-appellee.

Pope, Aylward, Sweeney & Stephenson, by Edward A. Sweeney, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of a workplace injury. Because the evidence supports the findings, and the findings of fact support the conclusions of law, the Full Commission's award is affirmed.

I. Factual and Procedural History

On 1 March 2016, Keith Brim ("Brim") slipped and fell at his place of employment, Harris Teeter. Brim was exiting the restroom when he slipped on the wet floor and landed on his left shoulder. Eventually a janitor helped him up. Brim then called his wife to tell her about the fall. Brim's manager, Gerald Taylor ("Taylor"), was out of work the day of the accident, but Brim reported the accident to Taylor three days later. Brim stated that Taylor did not respond or say anything when he informed him of the fall. Brim also told a co-worker Denise Coble ("Coble") about the fall a few days after the accident. Three weeks later, Brim mentioned the fall to Taylor again. Taylor did not report the accident and did not provide a response beyond "I hope you don't fall again."

Following the accident, Brim's shoulder continued to hurt, but he treated the pain with over-the-counter medication and continued to work. Brim used his right arm only to protect the injured left side. On 20 May 2016, Brim mentioned the fall to Taylor again in the parking lot. Later, Taylor called Brim with instructions to return to Harris Teeter to complete an accident report. Taylor also sent Brim to urgent care for treatment.

Brim was not taken out of work when he went to treatment, and there was no improvement in his symptoms after treatment. Brim was assigned light-duty work restrictions and worked under those conditions for a short time, until he requested a full-work duty note so he could continue to work his regular job. Brim's wife testified

that Brim requested full duty release because he was on a fixed income and had two special needs children at home. Brim's shoulder continued to worsen so he had surgery. Since his surgery, Brim has not returned to work at Harris Teeter, because they did not have a job for him that would accommodate his restrictions.

Brim filed a claim to the Industrial Commission on 1 March 2016. On 16 August 2017, a Deputy Commissioner filed an Opinion and Award concluding that Brim's claims were not filed in accordance with N. C. Gen. Stat. § 97-22 (2019). Brim appealed to the Full Commission on 6 March 2018. On 5 August 2019, the Full Commission overturned the Deputy Commissioner's decision. Defendant filed notice of appeal to this Court.

II. Standard of Review

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. This '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) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 43-34, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.*

III. Findings of Fact

Defendants contend that the Full Commission erred in reversing the Deputy Commission's decision by making findings of fact (9, 19, 20 and 21) indicating that Brim provided a timely report of his injury in accordance with N.C. Gen. Stat. § 97-22. Defendants contend that these findings of fact are in error and are not supported by the competent evidence of record nor the applicable law. We disagree.

"Every injured employee . . . shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give . . . written notice of the accident . . . and the employee shall not be entitled to physician's fees nor any compensation which may have accrued . . . unless it can be shown that the employer . . . had knowledge of the accident . . ." N.C. Gen. Stat. § 97-22 (2019).

"[F]acts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even where there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999).

a. Finding of Fact No. 9

There is competent evidence to support Finding of Fact No. 9. Defendants contend that this finding is not based on competent evidence of the record. In support of their argument, they state that the recorded statement is inconsistent with the hearing testimony as to the date Brim stated he informed Taylor of his injury.

Finding of Fact No. 9 states, "Plaintiff also gave a recorded statement to Defendant-Carrier Gallagher Basset Services on May 26, 2016, during which he gave a history of injury consistent with that testified to at the hearing." In the recorded statement, Brim stated, "It happened on March 1 at 6:56 a.m. in the morning. I went in and he was standing right there outside when I came out and I hit that floor." While the date given in the recorded statement is 1 March 2016 and the date given in the hearing testimony is 4 March 2016, the Finding of Fact No. 9 does not state that the dates are the same. Rather, it states that Brim consistently indicated that he reported his injury to Taylor and was ignored. Accordingly, Finding of Fact No. 9 is based on competent evidence of record and is binding on appeal.

b. Finding of Fact No. 19

There is competent evidence to support Finding of Fact No. 19. Defendants contend that this finding provides inconsistencies as to when Brim reported his injury. Taylor testified that Brim was "honest, reliable and credible." Coble testified that Brim told her he slipped and fell after coming out of the men's room, and Brim's wife testified that Brim called her immediately after the fall and reported a fall at work. Both Brim and Taylor testified that there was a brief parking lot conversation between the two of them. Finding of Fact No. 19 also stated that Taylor "had far more information regarding the accident than what one would learn in a passing comment in the parking lot." This is supported by Taylor's first phone call to the

nurse in which he reported specific details of the fall including that Brim was coming out of the bathroom at Harris Teeter, that the fall occurred on 1 March 2016, and that a member of the floor crew witnessed the fall. Accordingly, Finding of Fact No. 19 is based on competent evidence of record and is binding on appeal.

c. Finding of Fact No. 20

There is competent evidence to support Finding of Fact No. 20. Defendants contend that the Full Commission erred in not finding Taylor credible. This finding of fact provides that "the dissent posits Taylor learned of the details of Plaintiff's accident when he called Plaintiff to ask him to come to the store." However, in the recorded conversation between Taylor and the injury hotline, "Taylor does not state that he obtained any information about the accident from the Plaintiff during the phone call."

Finding of Fact No. 20 also finds that "no other evidence of record, including the testimony of Plaintiff and his wife, suggests that details of the accident were conveyed during the afternoon phone call." There is no testimony from Taylor, Brim, or Brim's wife that the phone call included any exchange of information regarding the accident. There is no statement in the transcript from the company nurse that indicates any information was given from Brim over the phone regarding the details of his accident. Accordingly, Finding of Fact No. 20 is based on competent evidence of record and is binding on appeal.

d. Finding of Fact No. 21

There is competent evidence to support Finding of Fact No. 21. Defendants contend that the Full Commission erred in concluding that Brim sustained a compensable injury by accident arising out of and in the course and scope of his employment, and that the actual notice in Finding of Fact No. 21 is not supported by the evidence. There is testimony from Brim, Coble, Brim's wife, Taylor, the recorded statement, and the medical records, all of which supports that Brim sustained an injury by accident arising out of and in the course of his employment with Harris Teeter, and that Harris Teeter had actual notice of Brim's injury on or about 4 March 2016 when he reported the accident to Taylor. As discussed above, the finding that Brim reported the injury to Defendants on 4 March 2016 is consistent with the evidence of record. Accordingly, Finding of Fact No. 21 is based on competent evidence of record and is binding on appeal.

IV. Conclusions of Law

Defendants contend that the Full Commission erred in the conclusions of law and subsequent award when such conclusions and award were not supported by the evidence of the record, the competent findings, or the applicable law. We disagree.

a. Conclusion of Law No. 1

The evidence supports each of the findings, and the findings support each of the conclusions. The Commission's Conclusion of Law No. 1 was proper because

competent evidence in the record establishes that Brim suffered a compensable injury by accident and reported that accident timely. The competent evidence of record includes Brim's hearing testimony, Brim's wife's testimony, Coble's testimony, the recorded statement, the deposition testimony of his treating physician and medical records.

b. Conclusion of Law No. 3

The Commission's Conclusion of Law No. 3, that Brim "has met his burden of showing a reasonable excuse for not providing written notice of his slip and fall injury until May 20, 2016," was proper because competent evidence in the record establishes that Brim reported the accident timely. Actual notice of injury is a reasonable excuse for the delay in providing written notice. *See Yingling v. Bank of America*, 225 N.C. App. 820, 828, 741 S.E.2d 395, 401 (2013). Defendants do not argue that actual notice is insufficient, instead they argue that Brim did not report the accident to anyone in his chain of command. However, Taylor was the store manager and was in Brim's chain of command. Taylor had actual notice of Brim's accident within three days of the injury. Accordingly, Conclusion of Law 3 is binding because competent evidence in the record establishes that Brim reported the accident timely.

c. Conclusions of Law No. 4-5

The Commission's Conclusions of Law No. 4 and 5 are supported by Findings of Fact No. 22, 23, and 24. Each of these findings of fact is supported by competent

evidence of record, including Brim's testimony, the treating physician's testimony and medical records. It is the Defendants' burden to show they were prejudiced by the lack of timely written notice; however, they have failed to do so. Defendants did not challenge Finding of Fact No. 22, which established that Defendants did not meet their burden of showing any prejudice for inability to investigate the claim based on Brim's failure to provide written notice. "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008).

Defendants further argue that they were prejudiced in Brim's medical treatment due to failure to provide written notice. Finding of Fact No. 23 states that Defendants had ample opportunity to direct Brim's medical care. The physician could not provide any testimony to a reasonable degree of medical certainty regarding the development of Brim's injury beyond that he believed the fall either caused or aggravated the injury. The physician testified that he did not know whether or not he would have limited Brim's work activities had he seen him earlier. Again, Defendants failed to prove prejudice. Because the evidence supports the findings, and the findings of fact support the conclusions of law, conclusions of law No. 4 and 5 must be upheld.

AFFIRMED.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).